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**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1941**

**No. 505**

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LESTER A. CRANCER AND GEORGE B. FLEISCH-  
MAN, CO-PARTNERS, DOING BUSINESS UNDER  
THE FIRM NAMES OF VALLEY STEEL PROD-  
UCTS COMPANY AND MID-VALLEY STEEL COM-  
PANY, PETITIONERS,

vs.

FRANK O. LOWDEN, JAMES E. GORMAN AND  
JOSEPH B. FLEMING, TRUSTEES OF THE CHI-  
CAGO, ROCK ISLAND AND PACIFIC RAILWAY  
COMPANY

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE EIGHTH CIRCUIT

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**PETITION FOR CERTIORARI FILED AUGUST 11, 1941.**

**CERTIORARI GRANTED OCTOBER 13, 1941.**

**United States Circuit Court of Appeals**  
**EIGHTH CIRCUIT.**

**No. 11,859**

**CIVIL.**

**LESTER A. CRANCER AND GEORGE B. FLEISCH-**  
**MAN, CO-PARTNERS, DOING BUSINESS UN-**  
**DER THE FIRM NAMES OF VALLEY STEEL**  
**PRODUCTS COMPANY AND MID-VALLEY**  
**STEEL COMPANY, RESPECTIVELY, APPEL-**  
**LANTS,**

**vs.**

**FRANK O. LOWDEN, JAMES E. GORMAN AND**  
**JOSEPH B. FLEMING, TRUSTEES OF THE**  
**CHICAGO, ROCK ISLAND AND PACIFIC RAIL-**  
**WAY COMPANY, A CORPORATION, APPEL-**  
**LEES.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES**  
**FOR THE EASTERN DISTRICT OF MISSOURI.**

**FILED SEPTEMBER 25, 1940.**

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit at the May Term, 1941, of said Court, before the Honorable Archibald K. Gardner and the Honorable Harvey M. Johnsen, Circuit Judges, and the Honorable John Caskie Collet, District Judge.

Attest:

E. E. KOCH,  
Clerk of the United States  
Circuit Court of Appeals  
for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the twenty-fifth day of September, A. D. 1940, a transcript of record pursuant to an appeal taken from the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Lester A. Crancer and George B. Fleischman, co-partners, doing business under the firm names of Valley Steel Products Company and Mid-Valley Steel Company, respectively, were Appellants and Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company, a Corporation, were Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:



[fol. 1] Docket Entry Showing Filing of Defendants' Notice of Appeal to United States Circuit Court of Appeals, Eighth Circuit, from Final Judgment and Mailing of Copies Thereof by Clerk to Attorneys for Plaintiffs, Etc.

June 29, 1940.

Defendants' notice of appeal to United States Circuit Court of Appeals, 8th Circuit, from final judgment entered herein assessing damages against defendants and the overruling of defendants' motion of new trial on April 1, 1940, filed in triplicate and copies thereof forthwith mailed by the Clerk of the Court to Messrs. Sullivan, Reeder & Finley, St. Louis, Missouri, and Hogsett, Murray, Trippe, Depping & Houts, Kansas City, Mo., attorneys of record for plaintiffs.

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[fol. 2] Notice of Appeal to the Circuit Court of Appeals  
—Eighth Circuit.

(Filed June 29, 1940.)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company, a corporation, Plaintiffs,  
No. 188. vs. Div. No. 2.

Lester A. Crancer and George B. Fleischman, Co-Partners, Doing Business under the Firm Names of Valley Steel Products Company and Mid-Valley Steel Company, Respectively, Defendants.

Notice is hereby given that Lester A. Crancer and George B. Fleischman, co-partners doing business as Val-



ley Steel Products Company and Mid-Valley Steel Company, defendants above named, hereby appeal to the Circuit Court of Appeals for the Eighth Circuit from the final judgment entered in this action, assessing damages of plaintiffs against defendants in the aggregate sum of \$2263.47 and costs, and the overruling of defendants' motion for new trial on April 1st, 1940.

IRL B. ROSENBLUM &  
BERNARD MELLITZ,

Attorneys for Lester A. Crancer  
and George B. Fleischman, De-  
fendants, 320 North Fourth St.,  
St. Louis, Mo.

[fol. 3]

Cost Bond.

Filed June 29, 1940.

Know All Men By These Presents:

That we, Massachusetts Bonding & Insurance Co., a corporation, as surety, Lester A. Crancer and George B. Fleischman, co-partners, doing business under the firm names of Valley Steel Products Company and Mid-Valley Steel Company, respectively, as principals, are held and firmly bound unto Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island & Pacific Railway Company, a corporation, in the full and just sum of Three Thousand Five Hundred Dollars, (\$3,500.00) to be paid to the said Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island & Pacific Railway Company, a corporation, heirs, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this ..... day of June, in the year of our Lord one thousand nine hundred and forty.

Whereas, lately at the September term, A. D. 1939, of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, in a suit depending in said Court between Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of

the Chicago, Rock Island & Pacific Railway Company, a corporation plaintiff and Lester A. Crancer and George B. Fleischman, co-partners, doing business under the firm names of Valley Steel Products Company and Mid-Valley Steel Company, respectively defendants Judgment was rendered against the said Lester A. Crancer and George B. Fleischman, co-partners, doing business under the firm names of Valley Steel Products Company and Mid-Valley Steel Company, respectively, and the said Lester A. Crancer and George B. Fleischman, co-partners, doing business under the firm names of Valley Steel Products Company and Mid-Valley Steel Company, respectively, have filed their notice of appeal in said court to reverse judgment in the aforesaid suit.

Now The Condition Of The Above Obligation Is Such, That if the said Lester A. Crancer and George B. Fleischman, co-partners, doing business under the firm names of Valley Steel Products Company and Mid-Valley Steel Company, respectively, shall prosecute said appeal to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed And Delivered In Presence Of—

GEORGE B. FLEISCHMAN, (Seal)  
LESTER A. CRANCER, (Seal)  
MASSACHUSETTS BONDING &  
INSURANCE CO., (Seal)

JOHN L. PATTERSON,  
Attorney-in-fact.

Approved by

GEO. H. MOORE, Judge.

[fol. 5] Docket Entry Showing Filing of Bill of Complaint and Issuance of Summons Thereon.

March 16, 1939.

Complaint filed and summons issued directed to defendants returnable within twenty days after service.

[fol. 6] Petition (as Amended February 2, 1940, and February 7, 1940.)

• Count I.

Come now Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island & Pacific Railway Company, and state and show to the Court that on November 22, 1933 (effective from and after December 1, 1933), the said Frank O. Lowden, James E. Gorman and Joseph B. Fleming were duly appointed Trustees of the Chicago, Rock Island & Pacific Railway Company by the District Court of the United States for the Northern District of Illinois, Eastern Division, in a certain bankruptcy proceeding therein pending, and that now and at all times since said December 1, 1933, the said above named Trustees have been in charge of the property and operation of said Chicago, Rock Island & Pacific Railway Company; that said Chicago, Rock Island & Pacific Railway Company is now and at all times mentioned herein was a corporation duly organized and existing according to law, and at all times mentioned herein was a common carrier of freight and passengers by railroad for hire and engaged in interstate commerce.

Plaintiffs for their cause of action against defendants under Count I hereof, state that the defendants are now and at all times mentioned herein were individuals engaged in business as co-partners under the firm names of Valley Steel Products Company and Mid-Valley Steel Company, respectively, and as such engaged in the business of buying, selling, shipping and handling of iron, steel and iron and steel products and other commodities in St. Louis, Missouri, and elsewhere.

Plaintiffs further state that on or about July 20, 1937, the defendants shipped to themselves in car Erie 14999 a certain shipment consisting of loose iron or steel pipe thread protecting rings weighing 60,280 pounds, from Shelby, Montana, to St. Louis, Missouri, way-bill being issued from Shelby, Montana; that said shipment was transported over the lines of the Great Northern Railroad Company from Shelby, Montana, to Minneapolis, Minnesota, and over the lines of the Chicago, Rock Island & Pacific Railway Company from Minneapolis, Minnesota, to

St. Louis, Missouri, and delivered to defendants on the 29th day of July, 1937; that the true, correct and lawful freight charges for transporting said shipment as provided in the applicable freight tariffs then on file with the Interstate Commerce Commission amounted to the sum of \$584.72; that freight charges in the sum of \$373.74 were paid by defendants leaving a balance of \$210.98 freight charges due plaintiffs on said shipment; that plaintiffs have frequently demanded payment of the sum of \$210.98, said balance of freight charges due on said shipment, and defendants have at all times refused and still refuse to pay the said balance of \$210.98.

Wherefore, plaintiffs pray judgment under Count I hereof against defendants in the sum of \$210.98, together with interest thereon at the rate of 6 per cent per annum from the date of the filing of this suit and for their costs herein incurred and expended.

#### Count II.

Plaintiffs for their second cause of action under Count II hereof adopt by reference the allegations in the first and second paragraphs of Count I as though said named paragraphs were here repeated and set out in full.

Plaintiffs further state that on or about July 26, 1937, defendants shipped to themselves in car CRI&P 188165 a certain shipment consisting of loose iron or steel pipe thread protecting rings weighing 97,300 pounds, from Wickett, Texas, to St. Louis, Missouri, way-bill being issued at Wickett, Texas; that said shipment was transported over the lines of the Texas & Pacific Railway Company from Wickett, Texas, to Fort Worth, Texas; over the lines of the Chicago, Rock Island & Gulf Railway Company from Fort Worth, Texas, to Terral, Oklahoma, and [fol. 7] over the lines of Chicago, Rock Island & Pacific Railway Company from Terral, Oklahoma, to St. Louis, Missouri, and delivered to defendants on the 30th day of July, 1937; that the true, correct and lawful freight charges for transporting said shipment as provided in the applicable freight tariffs then on file with the Interstate Commerce Commission amounted to the sum of \$915.11; that freight charges in the sum of \$321.09 were paid by defendants, leaving a balance of \$594.02 freight charges due



plaintiffs on said shipment; that plaintiffs have frequently demanded payment of said sum of \$594.02, the said balance of freight charges due on said shipment, and defendants have at all times refused and still refuse to pay said balance of \$594.02.

Wherefore, plaintiffs pray judgment under Count II hereof against defendants in the sum of \$594.02, together with interest thereon at the rate of 6 per cent per annum from the date of the filing of this suit, and for their costs herein incurred and expended.

### Count III.

Plaintiffs for their third cause of action under Count III hereof adopt by reference the allegations in the first and second paragraphs of Count I hereof, the same as though said named paragraphs were here repeated and set out in full.

Plaintiffs further state that on or about August 6, 1937, defendants shipped to themselves in car MP 73665 a certain shipment consisting of loose iron or steel pipe thread protecting rings weighing 56,100 pounds, from Kilgore, Texas, to St. Louis, Missouri, the way-bill being issued at Kilgore, Texas; that said shipment was transported over the lines of the International Great Northern Railway Company from Kilgore, Texas, to Fort Worth, Texas; over the lines of the Chicago, Rock Island & Gulf Railway Company from Fort Worth, Texas, to Terral, Oklahoma, and over the lines of the Chicago, Rock Island & Pacific Railway Company from Terral, Oklahoma, to St. Louis, Missouri, and delivered to defendants on the 13th day of August, 1937; that the true, correct and lawful freight charges for transporting said shipment as provided in the applicable freight tariffs on file with the Interstate Commerce Commission amounted to the sum of \$376.43; that freight charges in the sum of \$168.30 were paid by defendants, leaving a balance of \$208.13 freight charges due plaintiffs on said shipment; that plaintiffs have frequently demanded payment of said sum of \$208.13, the said balance of freight charges due the said plaintiffs on said shipment, and defendants have at all times refused and still refuse to pay said balance of \$208.13.

Wherefore, plaintiffs pray judgment under Count III hereof against defendants in the said sum of \$208.13, together with interest thereon at the rate of 6 per cent per annum from the date of the filing of this suit, and for their costs herein incurred and expended.

#### Count IV:

Plaintiffs for their fourth cause of action under Count IV hereof, adopt by reference the allegations in the first and second paragraphs of Count I hereof the same as though said named paragraphs were here repeated and set out in full.

Plaintiffs further state that on or about August 17, 1937, defendants shipped to themselves, in car SP 46075, a certain shipment of loose iron or steel pipe thread protecting rings weighing 67,220 pounds from Lamont, California, to St. Louis, Missouri; that said shipment was transported over the lines of the Southern Pacific Railroad Company, from Lamont, California (Bakersfield, California), to Santa Rosa, New Mexico; over the lines of the Chicago, Rock Island & Gulf Railway Company from Santa Rosa, New Mexico, to Texhoma, Oklahoma, and over the lines of the Chicago, Rock Island & Pacific Railway Company from Texhoma, Oklahoma, to St. Louis, Missouri, and delivered to defendants on the 25th day of August, 1937; that the true, correct and lawful freight charges for transporting said shipment as provided in the applicable freight tariffs on file with the Interstate Commerce Commission amounted to the sum of \$652.03; that freight charges in the sum of \$416.76 were paid by defendants, leaving a balance of \$235.27 freight charges due [fol. 8] plaintiffs on said shipment; that plaintiffs have frequently demanded payment of the said sum of \$235.27, the said balance of freight charges due the said plaintiffs on said shipment, and defendants have at all times refused and still refuse to pay said balance of \$235.27.

Wherefore, plaintiffs pray judgment under Count IV hereof against defendants in the sum of \$235.27, together with interest thereon at the rate of 6 per cent per annum from the date of the filing of this suit, and for their costs herein incurred and expended.



## Count V.

Plaintiffs for their fifth cause of action under Count V hereof, adopt by reference the allegations in the first and second paragraphs of Count I hereof the same as though said named paragraphs were here repeated and set out in full.

Plaintiffs further state that on or about August 12, 1937, defendants shipped to themselves, in car T&P 17421 a certain shipment of loose iron and steel pipe thread protecting rings weighing 83,900 pounds from Lake Charles, Louisiana, to St. Louis, Missouri, the way-bill being issued at Lake Charles, Louisiana; that said shipment was transported over the lines of the Kansas City Southern Railroad Company from Lake Charles, Louisiana, to Kansas City, Missouri, and over the lines of the Chicago, Rock Island & Pacific Railway Company from Kansas City, Missouri, to St. Louis, Missouri, and delivered to defendants on the 16th day of August, 1937; that the true, correct and lawful freight charges for transporting said shipment as provided in the applicable freight tariffs on file with the Interstate Commerce Commission amounted to the sum of \$747.55; that freight charges in the sum of \$218.14 were paid by defendants, leaving a balance of \$529.41 freight charges due plaintiffs on said shipment; that plaintiffs have frequently demanded payment of said sum of \$529.41, the said balance of freight charges due the said plaintiffs on said shipment, and defendants have at all times refused and still refuse to pay said balance of \$529.41.

Wherefore, plaintiffs pray judgment under Count V hereof against defendants in the sum of \$529.41, together with interest thereon at the rate of 6 per cent per annum from the date of the filing of this suit, and for their costs herein incurred and expended.

## Count VI.

Plaintiffs for their sixth cause of action under Count VI hereof, adopt by reference the allegations in the first and second paragraphs of Count I hereof the same as though said named paragraphs were here repeated and set out in full.

Plaintiffs further state that on or about August 23, 1937, defendants shipped to themselves in car T&P 17541, a certain shipment of loose iron or steel pipe thread protecting rings weighing 74,400 pounds, from Odessa, Texas, to St. Louis, Missouri; that said shipment was transported over the lines of the Texas & Pacific Railroad Company from Odessa, Texas, to Fort Worth, Texas; over the lines of the Chicago, Rock Island & Gulf Railway Company from Fort Worth, Texas, to Terral, Oklahoma, and over the lines of the Chicago, Rock Island & Pacific Railway Company from Terral, Oklahoma, to St. Louis, Missouri, and delivered to defendants on the 9th day of September, 1937; that the true, correct and lawful freight charges for transporting said shipment as provided in the applicable freight tariffs on file with the Interstate Commerce Commission amounted to the sum of \$638.35; that freight charges in the sum of \$247.50 were paid by defendants, leaving a balance of \$390.85 freight charges due plaintiffs on said shipment; that plaintiffs have frequently demanded payment of said sum of \$390.85, the said balance of freight charges due the said plaintiffs on said shipment, and defendants have at all times refused and still refuse to pay said balance of \$390.85.

[fol. 9] Wherefore, plaintiffs pray judgment under Count VI hereof against defendants in the said sum of \$390.85, together with interest thereon at the rate of 6 per cent per annum from the date of the filing of this suit, and for their costs herein incurred and expended.

#### Count VII.

Plaintiffs for their seventh cause of action under Count VII hereof, adopt by reference the allegations in the first and second paragraphs of Count I hereof the same as though said named paragraphs were here repeated and set out in full.

Plaintiffs further state that on or about June 2, 1937, defendants shipped to themselves in car PLE 44572, a certain shipment of loose pipe thread protecting rings weighing 56,100 pounds, from Rodessa, Louisiana, to St. Louis, Missouri; that said shipment was transported over the lines of the Kansas City Southern Railroad Company from Rodessa, Louisiana, to Kansas City, Missouri, and

over the lines of the Chicago, Rock Island & Pacific Railway Company from Kansas City, Missouri, to St. Louis, Missouri and delivered to defendants on the 5th day of June, 1937; that the true, correct and lawful freight charges for transporting said shipment as provided in the applicable freight tariffs on file with the Interstate Commerce Commission amounted to the sum of \$425.80; that freight charges in the sum of \$330.99 were paid by defendants, leaving a balance of \$94.81 freight charges due plaintiffs on said shipment; that plaintiffs have frequently demanded payment of the said sum of \$94.81, the said balance of freight charges due the said plaintiffs on said shipment, and defendants have at all times refused and still refuse to pay said balance of \$94.81.

Wherefore, plaintiffs pray judgment under Count VII hereof against defendants in the said sum of \$94.81, together with interest thereon at the rate of 6 per cent per annum from the date of the filing of this suit, and for their costs herein incurred and expended.

Wherefore, plaintiffs pray judgment under all counts of plaintiffs' petition against defendants in the total sum of \$2918.50 together with interest thereon at the rate of 6 per cent per annum from the date of the filing of this suit, and for their costs herein incurred and expended.

SULLIVAN, REEDER & FINLEY,

HOGSETT, MURRAY, TRIPPE,  
DEPPING AND HOUTS,

WILLIAM O. REEDER,

Attorneys for Plaintiffs.

Endorsed: Filed Mar. 16, 1939. Jas. J. O'Connor,  
Clerk.

[fol. 10] (Docket Entry of Filing of Marshal's Return of  
Service of Summons.)

March 21, 1939.

"Marshal's return of service to summons filed. (executed)"

[fol. 11]

## Summons.

District Court of the United States for the Eastern District of Missouri, ..... Division.

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island & Pacific Railway Company, a corporation, Plaintiffs,  
File No. 188. vs. Civil Action.

Lester A. Crancer and George B. Fleischman, co-partners, doing business under the firm name of Valley Steel Products Company and Mid-Valley Steel Company, respectively, Defendants.

To the above named Defendant:

You are hereby summoned and required to serve upon Messrs. Sullivan, Reeder & Finley, and Hogsett, Murray, Trippe, Depping & Houts, plaintiffs' attorneys, whose address Sullivan, Reeder & Finley, 411 N. 7th St., St. Louis, Mo., Hogsett, Murray, Trippe, Depping & Houts, 1016 Grand Ave. Temple, Kansas City, Mo., an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JAS. J. O'CONNOR,

Clerk of Court.

By Ruby Barham,

Deputy Clerk.

(Seal of Court)

Date: March 16, 1939.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 11a]

## Return on Service of Writ.

I hereby certify and return, that on the 17th day of March, 1939, I received the within summons and executed the same by delivering a true and correct copy of Summons and Petition as furnished by the Clerk of the Court to the within-named Lester A. Crancer, co-partner, d/b/a Valley Steel Products Company and Mid Valley Steel Company, on March 20, 1939 at St. Louis, Missouri.

I do further certify that I have executed this writ at St. Louis, Missouri, on March 20, 1939, by serving the same on the within-named George G. Fleischman, co-partner d/b/a Valley Steel Products Company and Mid Valley Steel Company, by delivering a true and correct copy of summons and petition as furnished by the Clerk of the Court to the within-named George G. Fleischman.

Marshal's Fees:	WILLIAM B. FAHY,
Travel.... \$.....	United States Marshal.
Service.... ..	By L. S. Davison,
.....	Deputy United States Marshal.

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

Received U. S. Marshal's Office, March 17, 1939, St. Louis, Mo.

Endorsed: Filed March 21, 1939, Jas. J. O'Connor, Clerk.

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[fol. 12] (Docket Entry of Filing of Answer to Complaint.)

"Mar. 29, 1939, Answer of defendants to plaintiffs' complaint, filed.

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[fol. 13] Answer.

(Filed March 29, 1939.)

Come now defendants and for their answer to plaintiffs' petition, deny each and every allegation therein contained.

Defendants further state that they have filed a complaint against plaintiffs and others before the Interstate Commerce Commission of the United States, wherein they have sought to have determined, and have challenged, the reasonableness and lawfulness of the rates exacted and demanded by the plaintiffs in the petition in this cause; that said complaint has been filed pursuant to the provisions of the "Interstate Commerce Act of the United States", and more particularly Section 16, paragraph "3" thereof, and defendants respectfully pray the Court to



stay proceedings in this cause of action pending the outcome of said complaint instituted before the Interstate Commerce Commission.

**IRL B. ROSENBLUM &  
BERNARD MELLITZ,**

Attorneys for Defendants.

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[fol. 14] (Docket Entry of Continuance of Case.)

"Sept. 22, 1939, Case continued to March Term, 1940."

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[fol. 15] Record Entry Showing Plaintiff's Motion to Set Aside Continuance and for Setting of Cause, Filed, Presented, Argued, Submitted and Granted, Etc.

December 14, 1939.

Now notice of presentation and motion of plaintiffs to set aside continuance of cause to March Term, 1940 and for a setting of cause is filed and presented, and said motion is argued and submitted to the Court, and granted and the aforesaid order of continuance is vacated and set aside, and said cause is set for trial on January 30, 1940.

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[fol. 16] (Motion of Plaintiffs to Set Aside Continuance, Etc.)

(Filed December 14, 1939.)

Come now the plaintiffs and show to the Court that on the 22nd day of September, 1939, this cause was continued on the application of the defendants to the March Term, 1940, of this Court, on the grounds and for the reason that the defendants herein, as plaintiffs, were then prosecuting a case against the Santa Fe Railroad before the Interstate Commerce Commission, in which action these defendants were seeking to have determined the reasonableness of the rates charged by the plaintiffs herein.

And plaintiffs further show to the Court that the aforesaid matter before the Interstate Commerce Commission was set for hearing in St. Louis on December 11, 1939, and on the application of the complainants (defendants herein) said matter was continued by the Commission to a date thereafter to be fixed by the Commission; and be-



cause of the action of the defendants in delaying the matter before the Interstate Commerce Commission, and indefinitely postponing the same, the plaintiffs in this case are entitled to a trial without further delay.

Wherefore, the plaintiffs pray the Court to set aside the order continuing the case and to set this cause down for trial at a time convenient to the Court.

WM. O. REEDER,  
SULLIVAN, REEDER,  
FINLEY & GAINES,  
Attorneys for Plaintiffs,  
1515 Ambassador Building,  
St. Louis, Mo.

---

[fol. 17] (Docket Entry of Filing of Motion of Defendants to Stay Proceedings and Plea to Jurisdiction, etc.)

"Jan. 5, 1940, Defendants' motion to stay proceedings and plea to the jurisdiction and plea in abatement, filed."

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[fol. 18] Defendants' Motion to Stay Proceedings and Plea to the Jurisdiction and Plea in Abatement.

(Filed Jan. 5, 1940.)

Come now defendants in the above entitled cause, and for their application to this Court to stay the proceedings herein and for their plea in abatement and plea to the jurisdiction herein, state that:

1. The above entitled cause was filed in this District Court of the United States on March 16, 1939;
2. That on or about March 16th, 1939, defendants herein filed, as complainants, before the Interstate Commerce Commission, a complaint wherein the plaintiffs in the above-entitled cause of action, among others, were named as defendants;
3. That in said complaint before the Interstate Commerce Commission, plaintiff in the above entitled cause was alleged to be a common carrier engaged in the transportation of property by railroad between points in various states in the United States, according as its route

runs, and as such common carrier, was charged to be subject to the provisions of the Interstate Commerce Act of the United States;

4. That said cause of action was docketed under the number "28215" before the Interstate Commerce Commission, and is in words and figures as follows, to-wit:

[fol. 19] 5. That the points of origin and destination mentioned in said complaint before the Commission include the points of origin and destination on the shipments set forth and alleged to have been made in plaintiffs' petition herein; that the aforesaid complaint directly and completely covers and includes the shipments alleged to have been made in plaintiffs' petition herein;

6. That said complaint is now pending before the Commission and is about to be set for hearing before an examiner of said Commission;

7. That said complaint involved and requires a determination and interpretation by the Interstate Commerce Commission of tariffs mentioned in said complaint, which said tariffs contain words and phrases not used in their ordinary sense, but used in a particularly technical or trade sense, and that by virtue thereof such determination and interpretation must first be had and made by the Interstate Commerce Commission, before this Court has jurisdiction to proceed with the trying of the above entitled cause.

8. That in said complaint the rates therein mentioned sought to be collected by plaintiffs in the above entitled cause are attacked and charged as being unjust, unreasonable, illegal, unjustly discriminatory and unduly prejudicial in violation of Sections I, II, III and VI of the Interstate Commerce Act; that by virtue thereof, the determination of the issues raised in the above entitled cause of action and the trial of said cause of action may not be had before this Court at present, and this Court has no jurisdiction to proceed with the trial of the above entitled cause until there has been a decision by the Interstate Commerce Commission of the things and matters contained in said complaint; that the determination of whether the rates charged in said complaint as aforesaid are

unjust, unreasonable, illegal, unjustly discriminatory and unduly prejudicial requires the exercise by the Interstate Commerce Commission of its function as a legislative, administrative and judicial tribunal; that said complaint [fol. 20] filed as aforesaid by defendants in the above entitled cause of action evokes the jurisdiction of the said Interstate Commerce Commission to determine whether or not said rate is unjust, unreasonable, illegal, unjustly discriminatory and unduly prejudicial; and that pending such determination, this Honorable Court has no jurisdiction to proceed with the trial of the above entitled cause; that the inquiry with reference to said rate is essentially one of fact and of discretion in technical matters concerning which uniformity might be secured only if its determination is left to the Interstate Commerce Commission, whose jurisdiction concerning said rate is exclusive; that the determination thereof is dependent upon adequate acquaintance with many intricate facts of transportation, and that such acquaintance is to be found only in a body of experts such as is contained in the Interstate Commerce Commission.

Wherefore, the premises considered, defendants pray that further proceedings in this cause of action be stayed and abated pending the decision upon the complaint instituted by the Interstate Commerce Commission as aforesaid.

IRL B. ROSENBLUM,  
BERNARD MELLITZ,

Attorneys for Defendants.

United States of America,  
State of Missouri,  
City of St. Louis.

Irl B. Rosenblum, being first duly sworn upon his oath, states that he is one of the attorneys for the defendants in the above entitled cause; and that the facts and matters contained in the above and foregoing motion to stay proceedings and plea to the jurisdiction and plea in abatement are true to the best of his knowledge and belief.

IRL B. ROSENBLUM.

Subscribed and sworn to before me this 4th day of January, 1940.

S. D. TRUE,  
Notary Public

(Seal)

My term expires: 12-24-1941.

[fol. 21] Complaint.

Before the Interstate Commerce Commission.

Valley Steel Products Company, and Mid-Valley Steel Company, Lester A. Crancer and George B. Fleischman, co-partners, Complainants,

No. .... vs.

The Atchison, Topeka And Santa Fe Railway Company, and other carriers named in Appendix A hereto, Defendants.

The complaint of the above named complainants respectfully shows:

I.

That complainants, Lester A. Crancer and George B. Fleischman are co-partners, doing business under the name of Mid-Valley Steel Company and also under the name of Valley Steel Products Company, and are engaged in the manufacture and sale of iron and steel products, with offices or places of business at St. Louis, Missouri, East St. Louis, Illinois and Cairo, Illinois.

II.

That the defendants, as named in Appendix A hereto, are all common carriers engaged in the transportation of property by railroad between points in various states in the United States, according as their routes run, and as such common carriers are subject to the provisions of the Interstate Commerce Act.

III.

That in the course of their business, complainants receive and have received at their aforesaid places of business at St. Louis, Missouri, East St. Louis, Illinois, and Cairo, Illinois, carload shipments of material from various points of

origin in the states of Texas, New Mexico, Louisiana, California, Montana, Wyoming, and Michigan, and the province of Alberta, Canada, which have been shipped by various consignors and sold to complainants by various vendors, on terms f. o. b. points of origin.

Representative of such points of origin, but not exclusive of others are.

**Louisiana:**

Brimstone  
Crowley  
Eunice  
Harvey  
Houma  
Iowa  
Jeanerette  
Lake Charles  
Lockport  
New Iberia  
Roanoke  
Rodessa  
Shreveport

**Texas:**

Alice  
Amarillo  
Beaumont  
Borger  
Breckenridge  
Chilton  
Cisco  
Corpus Christi

**Texas:**

Cross Plains  
Devers  
Eastland  
El Paso  
Gladewater  
Graham  
Houston  
Jefferson  
Kilgore  
Kingsville  
McAllen  
McCamey  
Monahan's  
Odessa  
Palestine  
Pampa  
Pearland  
Refugio  
Sonora  
Talco  
Wickett  
Willow Springs  
Winnie

**California:**

East Long Beach  
Famoso  
Long Beach  
Los Angeles

**Montana:**

Bridger  
Shelby

**New Mexico:**

Hobbs

**Wyoming:**

Manville

**Michigan:**

Gladwin

**Alberta, Canada:**

Okotoks

The material so received by complainants consists of used and discarded scrap thread protectors, of varying kinds and qualities, some of which are susceptible to processing, reconditioning, and remanufacturing, and some of which have no reclamation value.

Complainants have been receiving such shipments for the past several years, and expect in the future to continue receiving such shipments, provided defendants maintain freight rates thereon which are not prohibitive.



## IV.

That for the transportation of some of the shipments as described in paragraph III, the defendants have charged, demanded and collected from complainants freight charges which were generally based on rates provided in various tariffs as applicable on scrap iron or [fol. 23] scrap steel. On other shipments, the defendants have exacted freight charges based upon rates provided in various tariffs as applicable on pipe fittings.

## V.

That on or about July 16, 1938, defendant Berryman Henwood, Trustee, St. Louis Southwestern Railway Company, commenced an action at law in the District Court of the United States at St. Louis, Missouri, Docket No. 12682, in which said defendant seeks to recover from complainants certain alleged undercharges on some of the shipments described in paragraph III, more particularly shipments received by complainants during the period from April 23, 1936, to August 11, 1937, from points in the States of Louisiana, Texas and California.

Complainants deny that they are justly or legally indebted to defendant for the said alleged undercharges and propose to defend the aforesaid action.

## VI.

That on or about December 21, 1938, defendants C. E. Ervin and T. M. Stevens, Receivers of Mobile and Ohio Rail Road Company, commenced an action in the District Court of the United States at St. Louis, Missouri, under Docket No. 97, in which said defendants seek to recover of complainants certain alleged undercharges on some of the shipments described in paragraph III, more particularly shipments received by complainants during the period between September 18, 1937 and September 5, 1938, from points in the states of Texas, New Mexico, Louisiana, California and Montana.

Complainants deny that they are justly or legally indebted to defendants for the said alleged undercharges and propose to defend the aforesaid action.



## VII.

That on or about February 4, 1939, defendant Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, commenced an action in the District Court of the United [fol. 24] States at St. Louis, Missouri, under Docket No. 143, in which said defendant seeks to recover of complainants certain alleged undercharges on some of the shipments described in paragraph III, more particularly shipments received by complainants during the period between March 25, 1936 and April 2, 1937, from points in the states of New Mexico and Texas.

Complainants deny that they are justly or legally indebted to defendant for the said alleged undercharges and propose to defend the aforesaid action.

## VIII.

That the tariffs of defendants naming rates to St. Louis, Missouri, East St. Louis and Cairo, Illinois, from aforesaid points of origin, contain various items providing rates on scrap iron and scrap steel which attempt to define said material and limit the application of said rates to steel or iron "having value only for remelting purposes", or similar language, and that such definitions and limitations are unreasonable and illegal, and by their enforcement and non-enforcement result in violations of Sections 1, 2, 3 and 6 of the Interstate Commerce Act.

## IX.

That the rates and charges maintained and assessed on the complainants' shipments above described, were and are unjust and unreasonable, and in violation of Section 1 of the Act, to the extent that they exceeded or exceed rates applicable on scrap iron and scrap steel, wherefore complainants seek reparation.

Complainants further aver that as to the shipments referred to in paragraphs V, VI and VII hereof, defendants' claims and actions for alleged undercharges were and are without legal foundation and contrary to Section 6 of the Act; and if and to the extent that the defendants collect the same or any part thereof from complainants, complainants will be entitled to reparation therefor.

## X.

That the rates and charges maintained and assessed by defendants on complainants' shipments above described [fol. 25] are relatively higher, transportation circumstances and conditions considered, than the rates and charges assessed and maintained by the defendants on shipments of scrap iron and scrap steel between the same points.

## XI.

That by reason of the facts stated in the foregoing paragraphs, complainants have been and are subjected to the payment of rates and charges for transportation which are unjust and unreasonable, in violation of Section 1 of the Act, and unjustly discriminatory in violation of Section 2, and unduly prejudicial in violation of Section 3 of the Act.

Wherefore, complainants pray that defendants may be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants to cease and desist from the aforesaid violations of said act and to establish and put in force and apply in the future to the transportation of used and discarded scrap thread protectors from the points of origin hereinbefore named to the aforesaid destinations, in lieu of the rates herein alleged to be unlawful, such other rates as shall be just, reasonable, nonpreferential and nonprejudicial; and also pay to complainants by way of reparation for the unlawful charges hereinbefore alleged such sum as, in view of the evidence to be adduced herein, the Commission shall determine that complainants are entitled to as an award of damages under the provisions of said Act for violation thereof, that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at Chicago, Illinois, this 4th day of March, 1939.

LESTER A. CRANCER and GEORGE  
B. FLEISCHMAN co-partners,  
doing business as

VALLEY STEEL PRODUCTS  
COMPANY.

LESTER A. CRANCER and GEORGE  
B. FLEISCHMAN co-partners doing  
business as

MID-VALLEY STEEL COMPANY,

By Luther M. Walter,

John S. Burchmore,

Nuel D. Belnap,

Robert N. Burchmore,

Attorneys for Complainants.

WALTER, BURCHMORE &  
BELNAP,

2106 Field Building,  
Chicago, Illinois.

[fol. 26] Appendix A—List of Defendants.

Abilene & Southern Railway Company

Alton & Southern Railroad

The Alton Railroad Company

The Arkansas Western Railway Company

The Atchison, Topeka and Santa Fe Railway Company

The Beaumont, Sour Lake & Western Railway Company  
(Guy A. Thompson, Trustee)

Chicago, Burlington & Quincy Railroad Company

Chicago and North Western Railway Company  
(Charles P. Megan, Trustee)

The Chicago, Rock Island and Gulf Railway Company  
(Frank O. Lowden, James E. Gorman and Joseph B.  
Fleming, Trustees)

The Chicago, Rock Island and Pacific Railway Company  
(Frank O. Lowden, James E. Gorman and Joseph B.  
Fleming, Trustees)

Cisco & Northeastern Railway Company

The Cleveland, Cincinnati, Chicago and St. Louis Rail-  
way Company  
(The New York Central Railroad Company, Lessee)

The Colorado and Southern Railway Company  
 Eastland, Wichita Falls & Gulf Railroad Company  
 Fort Worth and Denver City Railway Company  
 Great Northern Railway Company  
 Gulf, Colorado and Santa Fe Railway Company  
 Illinois Central Railroad Company  
 International-Great Northern Railroad Company  
 (Guy A. Thompson, Trustee)  
 The Kansas City Southern Railway Company  
 Litchfield and Madison Railway Company  
 Louisiana & Arkansas Railway Company  
 Louisiana, Arkansas & Texas Railway Company  
 Manufacturers' Junction Railway Company  
 Manufacturers Railway Company  
 Minneapolis, St. Paul & Sault Ste. Marie Railway Company  
 (G. W. Webster and Joseph Chapman, Trustees)  
 Missouri and Arkansas Railway Company  
 Missouri-Kansas-Texas Railroad Company  
 Missouri-Kansas-Texas Railroad Company of Texas  
 Missouri Pacific Railroad Company  
 (Guy A. Thompson, Trustee)  
 Mobile and Ohio Railroad Company  
 (C. E. Ervin and T. M. Stevens, Receivers)  
 New Iberia & Northern Railroad Company  
 (Guy A. Thompson, Trustee)  
 New Orleans and Northeastern Railroad Company  
 New Orleans, Texas & Mexico Railway Company  
 (Guy A. Thompson, Trustee)  
 The New York Central Railroad Company  
 The New York, Chicago and St. Louis Railroad Company  
 Northern Pacific Railway Company

Panhandle and Santa Fe Railway Company

Paris and Mt. Pleasant Railroad Co.

The St. Louis, Brownsville and Mexico Railway Company  
(Guy A. Thompson, Trustee)

St. Louis, San Francisco and Texas Railway Company

St. Louis-San Francisco Railway Company  
(J. M. Kurn and John G. Lonsdale, Trustees)

St. Louis Southwestern Railway Company  
(Berryman Henwood, Trustee)

St. Louis Southwestern Railway Company of Texas  
(Berryman Henwood, Trustee)

Southern Pacific Company

Terminal Railroad Association of St. Louis

Texas and New Orleans Railroad Company

The Texas and Pacific Railway Company

The Texas Mexican Railway Company

Texas-New Mexico Railway Company

Union Pacific Railroad Company

Wabash Railway Company

(Norman B. Pitcairn and Frank C. Nicodemus, Jr.  
Receivers)

Wichita Falls & Southern Railroad Company

The Wichita Valley Railway Company

The Yazoo and Mississippi Valley Railroad Company

[fol. 27] Docket Entry Showing Amended Motion of Defendants to Stay Proceedings and Plea to the Jurisdiction and Plea in Abatement Argued, Submitted and Overruled, etc.

January 8, 1940.

Now by agreement of parties, the amended motion of defendants to stay proceedings and plea to the jurisdiction, and plea in abatement is argued and submitted to



the Court and by the Court after due consideration thereof overruled, to which ruling of the Court defendants ask and are granted an exception.

---

[fol. 28] (Docket Entry of Filing of Order of U. S. Circuit Court of Appeals Denying Application of Defendants for Writ of Prohibition.)

"Jan. 30, 1940, Attested copy of order of U. S. C. C. A., Eighth Circuit, dated January 25, 1940, denying application of defendants for writ of prohibition received, filed and entered."

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[fol. 29] (Docket Entry of Passing of Case for Trial.)

"Jan. 30, 1940, Cause passed for trial to January 31, 1940."

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[fol. 30] (Docket Entry of Filing of Stipulation as to Certain Facts.)

"Jan. 31, 1940. Stipulation of parties as to certain facts filed."

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[fol. 31]                      Stipulation of Facts.

(Filed January 31, 1940.)

It is agreed and stipulated by and between the parties hereto, by their respective attorneys of record, that the following facts may be taken as true without further proof on the trial of this cause, subject to the objection of either party as to their competency, relevancy and materiality, and without prejudice to the introduction by either party of other evidence not inconsistent therewith:

1. That on November 22, 1933, and effective from and after December 1, 1933, Frank O. Lowden, James E. Gorman and Joseph B. Fleming were duly appointed Trustees of the Chicago, Rock Island and Pacific Railway Company by the District Court of the United States for the Northern District of Illinois, Eastern Division, in a certain bankruptcy proceeding therein pending, and that now and at all times since December 1, 1933, the said Trustees

have been in charge of the property and operation of the Chicago, Rock Island and Pacific Railway Company; that said Chicago, The Rock Island and Pacific Railway Company is now and was at all times mentioned herein a corporation duly organized and existing according to law, and at all times mentioned herein was a common carrier of freight and passengers by railroad for hire and engaged in interstate commerce.

2. That Lester A. Crancer and George B. Fleischman are now and were at all times referred to in the petition in said cause co-partners, doing business under the firm names of Valley Steel Products Company and Mid-Valley Steel Company, and as such were engaged in the business of buying, selling, shipping and handling of iron, steel and iron and steel products and other commodities in St. Louis, Missouri, and elsewhere.

#### Count I.

3. That on or about July 20, 1937, the defendants, Lester A. Crancer and George B. Fleischman, co-partners, doing business under the firm names of Valley Steel Products Company and Mid-Valley Steel Company, respectively, shipped to themselves, in car Erie 14999, a certain shipment weighing 60,280 pounds, from Shelby, Montana, to St. Louis, Missouri, and that way-bill was issued at Shelby, Montana; that said shipment was transported over the lines of the Great Northern Railroad Company from Shelby, Montana, to Minneapolis, Minnesota, and over the lines of the Chicago, Rock Island and Pacific Railway Company from Minneapolis, Minnesota, to St. Louis, Missouri, and delivered to said defendants on the 29th day of July, 1937; that freight charges in the sum of \$373.74 were paid by said defendants, and that the plaintiffs have demanded of the said defendants payment of additional freight charges on said shipment in the sum of \$269.45, and the payment of said amount has been by the defendants refused.

#### Count II.

4. That on or about July 26, 1937, said defendants shipped to themselves, in car CRI&P 188165, a certain shipment weighing 97,300 pounds, from Wickett, Texas, to St. Louis, Missouri, and waybill was issued at Wickett,

Texas; that said shipment was transported over the lines of the Texas & Pacific Railway Company from Wickett, Texas, to Fort Worth, Texas, over the lines of the Chicago, Rock Island & Gulf Railway Company from Fort Worth, Texas, to Terral, Oklahoma, and over the Chicago, Rock Island and Pacific Railway Company lines from Terral, Oklahoma, to St. Louis, Missouri, and said shipment was delivered to the defendants on the 30th day of July, 1937; that freight charges in the sum of \$321.09 were paid by the defendants on said shipment; and that the plaintiff has made demand on the defendants for the payment of additional freight charges in the sum of \$727.80, which demand for payment has been by the defendants refused.

### Count III.

5. That on or about August 6, 1937, said defendants shipped to themselves, in car MP 73665, a certain shipment weighing 56,100 pounds, from Kilgore, Texas, to St. Louis, Missouri, and way-bill was issued at Kilgore, Texas; that [fol. 32] said shipment was transported over the lines of the International, Great Northern Railway Company from Kilgore, Texas, to Fort Worth, Texas, over the lines of the Chicago, Rock Island & Gulf Railway Company from Fort Worth, Texas, to Terral, Oklahoma, and over the lines of the Chicago, Rock Island and Pacific Railway Company from Terral, Oklahoma, to St. Louis, Missouri; that said shipment was delivered to the defendants on the 13th day of August, 1937; that the defendants paid freight charges in the sum of \$168.30 on said shipment; and that the plaintiffs have made demand on the defendants for the payment of additional freight charges in the sum of \$294.53, which demand for said additional freight charges the defendants have refused.

### Count IV.

6. That on or about the 17th day of August, 1937, said defendants shipped to themselves, in car SP 46075, a certain shipment weighing 67,220 pounds, from Lamont, California, to St. Louis, Missouri; that said shipment was transported over the lines of the Southern Pacific Railroad Company from Lamont, California (Bakersfield, California), to Santa Rosa, New Mexico, over the lines of the Chicago, Rock Island & Gulf Railway Company from Santa

Rosa, New Mexico, to Texhoma, Oklahoma, and over the lines of the Chicago, Rock Island and Pacific Railway Company from Texhoma, Oklahoma, to St. Louis, Missouri, and said shipment was delivered to the defendants on the 25th day of August, 1937; that the defendants paid freight charges in the sum of \$416.76 on said shipment; and that the plaintiffs have made demand on the defendants for the payment of additional freight charges on said shipment in the sum of \$300.47, which demand for the payment of such additional freight charges the defendants have refused.

#### Count V.

7. That on or about August 12, 1937, the said defendants shipped to themselves, in car T&P 17421, a certain shipment weighing 83,900 pounds, from Lake Charles, Louisiana, to St. Louis, Missouri, and way-bill was issued at Lake Charles, Louisiana; that said shipment was transported over the lines of the Kansas City Southern Railroad Company from Lake Charles, Louisiana, to Kansas City, Missouri, and over the lines of the Chicago, Rock Island and Pacific Railway Company from Kansas City, Missouri, to St. Louis, Missouri, and said shipment was delivered to the defendants on the 16th day of August, 1937; that the said defendants paid freight charges on said shipment in the sum of \$218.14; and that the plaintiffs have demanded of the defendants the payment of additional freight charges on said shipment in the sum of \$529.41, which payment for such additional freight charges the defendants have refused.

#### Count VI.

8. That on or about August 23, 1937, said defendants shipped to themselves, in car T&P 17541, a certain shipment weighing 74,400 pounds, from Odessa, Texas, to St. Louis, Missouri; that said shipment was transported over the lines of the Texas & Pacific Railroad Company from Odessa, Texas, to Fort Worth, Texas, over the lines of the Chicago, Rock Island & Gulf Railway Company from Fort Worth, Texas, to Terral, Oklahoma, and over the lines of the Chicago, Rock Island and Pacific Railway Company from Terral, Oklahoma, to St. Louis, Missouri, and said shipment was delivered to the defendants on



the 9th day of September, 1937; that said defendants paid freight charges on said shipment in the sum of \$247.50; and that the plaintiffs have made demand on the defendants for the payment of additional freight charges on said shipment in the sum of \$554.53, which demand for the payment of such additional freight charges the defendants have refused.

### Count VII.

9. That on or about the 2nd day of June, 1937, said defendants shipped to themselves, in car PLE 44572, a certain shipment weighing 56,100 pounds, from Rodessa, Louisiana, to St. Louis, Missouri; that said shipment was transported over the lines of the Kansas City Southern Railroad Company from Rodessa, Louisiana, to Kansas [fol. 33] City, Missouri, and over the lines of the Chicago, Rock Island and Pacific Railway Company from Kansas City, Missouri, to St. Louis, Missouri, and said shipment was delivered to said defendants on the 5th day of June, 1937; that said defendants paid freight charges on said shipment in the sum of \$330.99; and that the plaintiffs have made demand on the defendants for the payment of additional freight charges in the sum of \$94.81, which demand for such additional freight charges the defendants have refused, that either party may use in evidence uncertified copies of tariffs.

HOGSETT, MURRAY, TRIPPE,  
DEPPING & HOUTS,

SULLIVAN, REEDER, FINLEY &  
GAINES,

Attorneys for Plaintiffs.

IRL B. ROSENBLUM & BERNARD  
MELLITZ,

Attorneys for Defendants.

[fol. 34]

(Trial, January 31, 1940.)

January 31, 1940.

Now come the parties by their respective attorneys and file stipulation as to certain facts whereupon final hearing



of cause before the Court is commenced, but not concluded, and further proceedings on the trial of this cause are postponed until tomorrow at 10 o'clock a. m.

---

[fol. 35] (Trial, February 1, 1940.)

February 1, 1940.

Now again come the parties by their respective attorneys, whereupon final hearing of cause before the Court is resumed, but not concluded at the hour of adjournment, and further proceedings are postponed until tomorrow at ten o'clock a. m.

---

[fol. 36] (Trial, February 2, 1940; Complaint Amended.)

February 2, 1940.

Now by leave of Court plaintiffs amend their complaint by deletion and interlineation in accordance with memo this day filed.

And now again come the parties by their respective attorneys, whereupon final hearing of cause before the Court is resumed but not concluded and further proceedings on the trial of this cause are postponed until tomorrow at ten o'clock a. m.

---

[fol. 37] (Trial, February 3, 1940.)

February 3, 1940.

Now again come the parties by their respective attorneys whereupon final hearing of cause before the Court is resumed but not concluded and further proceedings on trial of cause are postponed until Monday next at ten o'clock a. m.

---

[fol. 38] (Trial, February 5, 1940.)

February 5, 1940.

Now again come the parties by their respective attorneys, whereupon final hearing of cause before the Court is resumed; at the close of plaintiff's case oral motion

of defendants to dismiss is made and submitted to the Court and by the Court overruled, whereupon further hearing of trial of cause is postponed until tomorrow at ten o'clock a. m.

---

[fol. 39]

(Trial, February 6, 1940.)

February 6, 1940.

Now again come the parties by their respective attorneys, whereupon final hearing of cause before the Court is resumed and concluded. And now plaintiff's proposed findings of fact and conclusions of law, together with proposed judgment is submitted to the Court. And now cause is passed to tomorrow for argument.

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[fol. 40] (Docket Entry Showing Amendment of Petition by Interlineation.)

"Feb. 7, 1940. Plaintiff's petition amended by interlineation in accordance with memo filed."

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[fol. 41] (Trial, February 7, 1940; Proposed Findings of Fact and Conclusions of Law Adopted by Court.)

February 7, 1940.

Now there comes plaintiff herein and amends his petition by interlineation in accordance with memo filed.

And now again come the parties by their respective attorneys whereupon final arguments are commenced and concluded and cause on the merits is submitted to the Court. And now plaintiffs' suggested findings of fact and conclusions of law and proposed form of judgment and defendants' proposed findings of fact and conclusions of law are submitted to the Court, and the plaintiffs' proposed findings of fact and conclusions of law of this Court are adopted as the Court's findings of fact and conclusions of law, and are filed herein, and judgment in accordance therewith is filed and entered.

And now there are filed herein, defendants' requested findings of fact and conclusions of law marked "refused".

---

[fol. 42] Transcript of Evidence and Proceedings

(Filed Sept. 24, 1940.)

District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island & Pacific Railway Company, a corporation, Plaintiffs,  
No. 188 vs.

Lester A. Crancer and George B. Fleischman, Co-Partners, Doing Business Under the Firm Names of Valley Steel Products Company and Mid-Valley Steel Company, Respectively, Defendants.

Be It Remembered: That on January 31, February 1, 2, 3, 5, 6 and 7, 1940, and during the September Term, A. D., 1939, of the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, the following proceedings were had before the Honorable George H. Moore:

Appearances:

Messrs. Hogsett Murray, Trippe, Depping & Houts, By Hale Houts, Esq., and Messrs. Sullivan, Reeder, Finley & Gaines, By William O. Reeder, Esq., For Plaintiffs.

[fol. 43] Irl B. Rosenblum, Esq., and Bernard Mellitz, Esq., for Defendant.

[fol. 44] Mr. Rosenblum: This is by way of preliminary, your Honor.

We would like, representing the defendants, to again raise the question that has been raised so often here, for several reasons: In the first place, this case was continued, when it was first set, because the matter was pending before the Interstate Commerce Commission. A motion was then filed by the plaintiffs to set aside that order of continuance, for the reason that the Commission had set the hearing on December 11th, and then the defendants in this case (complainants in that case) had obtained an indefinite continuance before the Commission. Since the

last time we appeared before your Honor that case has been set for hearing before the Commission, on February 29th.

It is true, that we appeared before the United States Circuit Court of Appeals and took up orally the application for a Writ of Prohibition, that was served upon you in this case. At the hearing, which was an informal one in Chambers, before Judge Woodrough and Judge Van Valkenburgh, in Kansas City, we submitted the application for Writ of Prohibition, and the suggestions in support of it, and it was opposed by counsel for Plaintiffs in this case.

The court adjourned, or these two gentlemen recessed. After a time we came back there and they told us that they would deny the application for [Write] of Prohibition, but made no statement of the ground of their denial.

Both questions were raised in the oral argument, first, the question whether the right to a prohibition existed, and I think, in view of the fact that the Court made no ruling or issued no decision, that it might just as well be said that the application was denied for the reason that the matter might be raised on appeal.

Since that is the situation, we would like at this time to again object to the Court trying this case, for the reason that it has no jurisdiction to proceed, because the reasonableness of the rates involved in this suit is in question before the Commission and the hearing is set for February 29.

I say this by way of argument, and I understand that your Honor has a right to disregard it if you wish, but there is a companion case pending before Judge Davis. We filed the same motion to stay proceedings in his division and he overruled that motion. However, he had previously set the case and he says this in his memorandum:

"In view, however, of the matters set up by the defendants we are of the opinion that if the Interstate Commerce Commission is going to reopen the investigation of the

rates in controversy the trial of this matter should be postponed."

The Court: This Court has already passed on that. [fol. 46]. The motion is overruled and we will proceed.

Mr. Rosenblum: Note our exception.

The Court: That is not necessary, under the new Rules.

Mr. Bailiff, announce a brief recess.

(At this point a brief recess was had.)

Mr. Rosenblum: I don't want to tire the patience of the Court, but with reference to the motion I just made I think I ought to make a record here, so that the matter can be properly preserved.

So, I would like to offer in evidence, on my motion, the complaint that is pending before the Interstate Commerce Commission, in the case of Valley Steel Products Company, et al. vs. Atchison, Topeka and Santa Fe Railway Company, being docketed as No. 28215. A copy of that complaint is attached to our motion to stay proceedings. I would like to offer that in evidence.

I would like to make an offer of proof to show that the hearing before the Commission has been set in St. Louis for February 29, 1940.

Mr. Houts: It has been set at Cairo, Illinois, instead of St. Louis. The first setting was in St. Louis.

Mr. Rosenblum: I would also like to offer to prove that the reasonableness of the rates sought to be collected [fol. 47] in this suit before your Honor is challenged in this complaint.

As to the setting of the cause and the challenges for reasonableness, I would like to put Mr. Williams on the stand, unless it is admitted that those are the facts.

Mr. Reeder: You mean, as to the setting of the case?

Mr. Rosenblum: As to the setting of the case and as to the fact that the reasonableness of the rates sought to be collected in this petition is challenged in that complaint before the Commission.



Mr. Houts: I think we want to object to the offer on the ground that the matter offered to be proved, if it could be proved, would constitute no defense or grounds for a continuance or stay.

The Court: Sustained.

Mr. Rosenblum: Now we are ready.

[fol. 48] Thereupon the plaintiffs, to sustain the issues in their behalves, offered the following evidence:

Mr. Reeder: We now offer in evidence a paper that has been marked Plaintiff's Exhibit 1. It is a Stipulation of Facts. Many of the facts necessary to be proven by the plaintiffs are here stipulated. If your Honor wishes, I will briefly outline what they are.

The capacity of the plaintiffs and the defendants is admitted.

The number and origin of all of the cars is admitted, the point of origin and point of destination of these various cars, covered in the eight counts, is admitted.

The weight of the cars is admitted.

The amount of charges paid by the defendants is admitted, and the amount of freight that is claimed to be due. It is admitted that demands have been made upon the defendants and they have refused to pay them.

That covers all eight counts in the petition. There are eight shipments sued on.

Mr. Rosenblum: There is no objection to the introduction in evidence of the stipulation.

Mr. Reeder: I might say, your Honor, that there are about two facts necessary for plaintiff's proof that are not admitted; one is the contents of these cars, and the second is the applicable tariff to these particular shipments [fol. 49], and we will direct the evidence to the proof of those facts.

The Stipulation of Facts was thereupon marked Plaintiffs' Exhibit 1 and is in words and figures as follows, to-wit:

Dist. Clk's Note: Exhibit 1 is not inserted at this place as it heretofore appears in the record proper of this transcript.

[fol. 50] HARRY M. HINES, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the plaintiffs as follows:

Direct Examination.

By Mr. Reeder:

Q. Will you please state your name?

A. Harry M. Hines.

Q. Where do you live? A. 5246 Wabada.

Q. What is your business?

A. Rate clerk, Rock Island Railway.

Q. How long have you been employed by the Rock Island Railway? A. Twenty years tomorrow.

Q. Are you located in St. Louis? A. Yes, sir.

Q. Were you so employed in 1937? A. Yes, sir.

Q. All of that year? A. Yes.

Q. Mr. Hines, beginning in June of 1937, were there any shipments coming through to the Valley Steel Products Company, of protecting rings?

Mr. Rosenblum: I object to that, your Honor, as being leading and suggestive.

Mr. Reeder: I will withdraw the question and reframe it.

Q. About when was your attention first called to the shipments to the Valley Steel Products Company?

A. Upon receipt of the first car.

Q. Upon receipt of the first car?

[fol. 51] A. Into St. Louis, over our line.

Q. Does any piece of paper accompany the shipment of a car? A. Yes, sir.

Q. What is that? A. A way-bill.

Q. Does the way-bill show what the contents of the car are, the description of the shipment? A. Yes, sir.

Mr. Rosenblum: That is objected to—

Mr. Reeder: We will introduce the way-bills later. This is preliminary.

The Court: You are withdrawing your objection?

Mr. Rosenblum: Yes.

Mr. Reeder: What did you do when the first car arrived and you received the way-bill?

Mr. Rosenblum: May I ask what he refers to as the first car? The first car mentioned in the first count of this petition?

Mr. Reeder: This testimony will cover the eight cars in the eight counts.

Mr. Rosenblum: You mean, the first of the eight in point of time?

Mr. Reeder: In point of time, this is the first car received here, of these eight, shipped to these people. I think it was in June, 1937.

Q. When you received the way-bill, what did you do, Mr. Hines?

A. The description on the way-bill—being a rate clerk, [fol. 52] I might say the description on the way-bill aroused my curiosity as it was billed "pipe rings", or however the bill read. I don't recall offhand just how the way-bill did read. "Pipe ring fittings", I believe.

Mr. Rosenblum: I object to him stating the contents.

Mr. Reeder: You may not do that, but tell us what you did and why you did it.

A. I would like to say that underneath that description it said "scrap iron".

Mr. Rosenblum: The witness is doing a thing that he should not do; he probably does not recognize that. The paper itself will be the best evidence, and his motive for doing something is not in issue here. I object to the question as to its form.

Mr. Reeder: All right. I will come to the point.

Q. State what, if anything, as a rate clerk you did after you examined this way-bill; what, if anything, did you do?

A. I called the Western Weighing Inspection Bureau for an inspection on the car.

Q. Was that inspection made by that Bureau?

A. Yes.

Q. Mr. Hines, did you receive subsequent shipments?

A. Yes, sir.

Q. I will ask you whether or not you have examined the original file in your office covering the eight shipments described in the eight counts of this petition; have you done that? A. Yes.

[fol. 53] Q. State whether or not you, as a rate clerk, after examining the way-bill in each of these cases, ordered inspection of each of these cars, the eight cars.

A. Yes; inspection was ordered.

Q. Was it made? A. Yes, sir.

Q. Were you familiar with the business of the Valley Steel Products at that time? A. No, sir.

Q. Were you familiar with the companies in St. Louis that were then engaged in the scrap iron business?

A. Yes, sir.

Q. Was the Valley Steel Products Company, one of the defendants in this case, to your knowledge then engaged in that business?

A. I had never heard of them in the scrap iron business.

Q. I will ask you whether or not, when you saw these way-bills, with that information that you had concerning the companies engaged in scrap iron business, and this company—did that have anything to do with causing you to make an inspection of these cars?

Mr. Rosenblum: That is objected to as not relevant to any issue here, his motive in having the cars inspected.

Mr. Reeder: I will withdraw it.

The Court: Sustained.

Mr. Reeder: Very well. That is all.

[fol. 54] Cross-Examination.

By Mr. Rosenblum:

Q. May I ask you how you know the Western Weighing and Inspection Bureau made an inspection of these cars; is it of your own knowledge, or was it reported?

A. Yes, sir.

Q. How did you learn of it?

A. The Western Weighing and Inspection Bureau sent a man to the railroad yard and made an inspection. He came to our office and advised us that the inspection had been made, and so inserted on the way-bill as to the proper contents of the car.

Q. That was his conclusion as to the proper contents; is that what you mean? A. Yes.

Q. You ordered that, in every case?

A. Yes, sir.

Q. In each one of these eight cars?

A. The records so indicate.

Q. You had, yourself, ordered it?

A. Well, there is a possibility that I didn't call them on the 'phone on all eight cars, but I am on the job. It is my job to do it.

Q. And they made such an inspection of each of the eight cars? A. Yes, sir.

Q. And reported to your office then; did they?

A. Yes, sir.

Q. You didn't know anything at all about the business of these defendants, did you; what business they are in?

A. No, sir.

[fol. 55] Q. Who changed the rate that was charged on these cars, anybody in your railroad company?

A. We rated the shipment on the basis of the pipe fitting rate, in our office.

Q. Who did that? A. I did.

Q. Did you ever see any of these so-called fittings?

A. Yes, sir.

Q. When?

A. On arrival of the cars, when they were inspected.

Q. Did you see them when they were inspected, along with the Western Weighing? A. Yes.

Q. Did you see all eight cars?

A. No, sir; I saw—I wouldn't say offhand. I don't recall, but I think there were four cars, a sample was brought up into our office.

Q. You didn't see the car; the sample was brought to your office?

A. I saw the cars as they rolled by the window, but, of course, I know nothing about—

Q. You couldn't see what was in the cars?

A. Oh, yes.



Q. You had a sample brought up to your office?

A. I think that the Western Weighing took a sample and came up to the office to make a report.

Q. They showed you that sample?

A. It was laying on my desk. It was made, a report, across the desk from me.

[fol. 56] Mr. Rosenblum: I would like the opportunity to cross-examine this witness at a later time, your Honor, if I may be permitted to do so.

Mr. Reeder: There will be no objection unless—

Mr. Rosenblum: I would like to have an opportunity of cross-examining him when we have some samples in court, which we haven't here at this time.

The Court: Very well.

#### Redirect Examination.

By Mr. Reeder:

Q. These eight shipments in question, what did they come through billed as?

A. Pipe ring fittings, I believe was the description.

Mr. Rosenblum: I objected to that question once. I don't see why it should be repeated.

The Witness: Pipe—

The Court (to the witness): Wait until counsel gets through making his objection.

Mr. Reeder: The question is withdrawn, to save time.

Q. Tell us who the Western Weighing and Inspection Bureau is.

A. They are the railroads' representative, to make inspections for us, and for the—

Q. Do they make inspections only for you, or for all the railroads?

A. Well, for all lines, so far as I know.

Q. In what area, if you know; or do you know?

A. In the Western Division, I believe, WWI, known as [fol. 57] the Western Weighing Inspection Bureau.

Mr. Reeder: That is all.

MICHAEL J. McGRANE, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the plaintiffs, as follows:

Direct Examination.

By Mr. Reeder:

Q. State your name, please.

A. Michael J. McGrane.

Q. Where do you live? A. 5401 Arlington.

Q. What is your business? A. Freight Inspector.

Q. Employed by whom?

A. Western Weighing and Inspection Bureau.

Q. How long have you been so employed by that Bureau? A. Thirty-nine years.

Q. Tell us something about the Western Weighing and Inspection Bureau.

A. Their business is to take care of inspections and weighing of freight; proper classification.

Q. Inspection of the contents of cars? A. Yes, sir.

Q. And the proper weight, is that what you see to?

A. Yes, sir.

Q. Where do you make those inspections, Mr. McGrane? A. At present, on the platform.

Q. The Western Weighing and Inspection Bureau operates in what area of the United States?

A. In what?

Q. Over what area?

A. I couldn't answer; western territory.

[fol. 58] Q. In western territory. I will ask you whether or not you received a request to make an inspection of a car shipped to the Valley Steel Products Company from Shelby, Montana, to St. Louis, Missouri, in July, 1937; if you made an inspection of car Erie 14999, shipped July 20, 1937 (handing document to the witness).

A. Yes, sir.

Q. And when did you make that inspection?

A. July 31st, 1937.

Q. And where was it made? A. At the plant.

Q. At what plant?

A. Of the Valley Steel.

Q. Of the Valley Steel Products Company. Had the car been unloaded, or was it still loaded?

A. No, sir; it was still loaded;

Q. Was it an open or closed car?

A. An open car.

Q. What were the contents of that car?

A. A carload of used iron thread protecting pipe rings.

Q. Used iron thread pipe protecting rings. Did you verify the weight at that time?

A. The weight shows there.

Q. Did you have the way-bill with you when you made that inspection, or a copy of it? A. No, sir.

Q. Did you make a report of the result of your inspection? A. Yes.

Q. To whom did you make that report?

A. To the Western Weighing and Inspection Bureau.

Q. Have you a book in which you recorded the result of your inspection? A. Yes, sir.

[fol. 59] Q. Do you keep that as a permanent record?

A. Yes, sir.

Q. Did you at that time take a sample of the rings that were contained in this car?

A. On this individual car?

Q. Yes. A. I couldn't answer.

Q. You couldn't answer as to this particular car. Did you do that sometimes, occasionally? A. Yes, sir.

Q. Can you tell us what these rings are, or do you know?

A. They are for protection of pipe in transit.

Q. They are used for protection of pipe in transit. (To Mr. Rosenblum) If you don't object, I will lead just a little.

Q. It is a ring that protects the thread of the pipe?

A. Protecting the thread.

Q. That is how they got the name, protecting rings. Those rings are discarded when the pipe is put in use at its destination; is that correct? Can you tell us whether or not those iron thread protecting rings have a commercial value for reconditioning and resale?

Mr. Rosenblum: That is objected to; this man is not qualified on the subject of scrap iron or pipe protecting rings or anything else, and that calls for a conclusion that he cannot give.

Mr. Reeder: He may not be able to tell us what the value is, but he can tell what is done with them.

Mr. Rosenblum: I object.

[fol. 60] The Court: Read the question.

(Last previous question read to the Court.)

The Court: Objection sustained.

Mr. Reeder: Do you know, Mr. McGrane, what is done with those rings?

Mr. Rosenblum: I object to that, too, unless he qualifies this witness.

The Court: Sustained.

Mr. Reeder: Very well.

Q. How long have you been inspecting rings of this particular type?

Mr. Rosenblum: I object to that question, your Honor, there being no showing that he has ever inspected them before.

The Court: Overruled.

Mr. Reeder: Answer the question.

A. How long?

Q. Yes. A. Quite a number of years.

The Court: What do you mean by "quite a number of years"?

The Witness: In so far as—

The Court: How many years do you mean; five years or twenty years or thirty years?

The Witness: Three years at present, but we have had them in the yards prior to that time.

By Mr. Reeder:

Q. Have there been shipments of these iron thread [fol. 61] protecting rings during the past three years, that you have inspected? A. What is the question?

Q. Have there been many shipments of these rings to St. Louis during the past three years, that you have made inspections of for the purpose of classification?

Mr. Rosenblum: You mean the past three years preceding this year?

Mr. Reeder: Yes.

A. Quite a number of cars.

Q. What is the purpose of your inspection, Mr. McGrane? A. The purpose of that?

Q. Yes; why do you inspect them?

A. Proper description.

Q. So that it can be given the proper rate?

Mr. Rosenblum: I object to that, your Honor, as leading and suggestive, and no evidence—

The Court: Overruled.

By Mr. Reeder:

Q. Is that correct? A. Yes, sir.

Q. From your observation and inspection during the past three years of carloads of thread protecting rings similar to the contents of these cars that you inspected, can you tell us what was done with those cars—what use was made of the contents of the cars, what use was made of those rings?

Mr. Rosenblum: I object to the question. In the first place, it calls for a conclusion of this witness. He has testified he made an inspection. He has not testified he [fol. 62] knows a thing about what use is made of them.

The second, and more important, reason is that no rate may be fixed or charged depending upon the use to which the product is put. The books are full of those kind of cases, which I will be glad to cite to your Honor.

The Court: Sustained.

Mr. Reeder: I will ask you whether or not, later on, you made an inspection of another car, covered by Count 7, shipped to the defendant, being car PLE 44572, shipped on or about June 2, 1937, from Rodessa, Louisiana, to St. Louis, containing 56,100 pounds. Did you make an inspection of that car? A. Yes, sir.

Q. When did you make an inspection of that car?

A. June 7, 1937.

Q. Where was that inspection made?



A. That was also made at the plant.

Q. Do you recall whether or not you took a sample of the rings from that car?

Mr. Rosenblum: Is the witness testifying from his recollection, or from a book or record which he has in front of him?

The Court: I don't know.

A. I don't remember whether I took a sample of it or not.

Mr. Reeder: I will withdraw it.

Q. When you make these inspections, what record do [fol. 63] you make of an inspection at the time and your findings? A. The record?

Q. What record do you make?

A. Carload of second-hand used iron thread—

Q. I am not asking you that. You do make a record?

A. Oh, sure.

Q. You have a form on which that record is made?

A. Yes, sir.

Q. When, with reference to the time the inspection is made, do you make this record?

A. Immediately after, that same day.

Q. You have a book in which you, at the time, make a record of your inspection, I believe? A. Yes, sir.

Q. You have in your hand the record of this shipment, have you, and this inspection, made then? A. Yes.

Q. I guess you make a great many inspections, do you, Mr. McGrane? A. Yes, sir.

Q. I will ask you to refer to that record—is it in your handwriting? A. Yes, sir.

Q. Refer to that record and tell us when that inspection was made.

Mr. Rosenblum: That is objected to, your Honor. I don't want to be too technical, but either the record should be introduced in evidence or else the witness should re-[fol. 64] fresh his recollection by using it.

Mr. Reeder: I will introduce the record, if you wish. I thought we would shorten it.

Q. First, refresh your recollection from the record you have and tell us when the inspection was made of this car.

A. June 7th, 1937.

Q. And where? A. At the plant.

Q. What were the contents of that car?

Mr. Rosenblum: I object to that, your Honor. There has been no showing that this witness is qualified to tell what the contents of the car was.

Mr. Reeder: We will have a number of rings and samples from these cars, testified about by other witnesses, covering other cars. They were all the same material. We will show that.

Mr. Rosenblum: But the conclusion of this witness is, as I gathered it from his testimony before—and I suppose it will be the same thing here—that these were certain designated things that he is going to designate in accordance with what probably will be some tariff rate that they may introduce, and there is no showing that this witness is qualified to testify as to what these articles were in accordance with the rules and regulations of the Interstate Commerce Commission.

Mr. Reeder: This product is a very definite commodity that is generally known—

[fol. 65] Mr. Rosenblum: But the problem is, is this product scrap iron—

The Court: That is not what he is attempting to show by this witness by this question.

Mr. Rosenblum: As I understood the question he said, "What do you designate them?"

Mr. Reeder: I said, "What was in the car?"

Mr. Rosenblum: I thought he said, "What do you call them?"

The Court: I didn't so understand the question.

Mr. Reeder: Refresh your recollection from the original report and tell us what was in this car.

A. As found on inspection, printed form, carload of second-hand used iron thread protecting pipe rings.

Q. Was that an open car or a closed car?

A. Yes, sir.

The Court: Wait a minute—

Mr. Reeder: Tell us whether or not these rings were in packages or loose. A. Loose.

Q. On the first car that you inspected, under Count 1, were those rings in packages or loose in the car?

A. Loose.

Q. Were you there at the plant long enough to determine and find out what the defendants did with these rings?

Mr. Rosenblum: What the defendants did with these rings is not important at this time, for the reason that you can not base a freight rate upon the use to which you put an article which you receive.

[fol. 66] Mr. Reeder: As to what the rate should be, we will come to that later.

Your Honor, scrap iron for remelting purposes is one thing. We claim that these rings were bought up and shipped in here, reconditioned, shipped out and resold. That is what we will prove. Scrap iron, loose iron, that has no commercial value, that is worn out and shipped in for remelting purposes, has one tariff rate. These rings have another tariff rate, a higher rate, and that is what we expect to show.

I think proof of what the defendants actually did, whether they remelted these rings and made something else out of them, has a bearing on whether this was scrap iron or whether they were rings of commercial value.

Mr. Rosenblum: I don't suppose it does any good to object to the statement of counsel, because there is no jury here, but counsel has not stated correctly the scrap iron classification or the scrap iron tariff. There is not a word said in it about commercial value. The scrap iron tariff is scrap iron—as I recall it—or pieces of steel or metal having value for remelting purposes only.

Now, the courts have said that that means a commercial value, and the witness has testified that these are used—

(To the witness) What was the exact language of the last—

The Witness: Second-hand protecting iron pipe rings.

[fol. 67] Mr. Rosenblum: In this case, we expect to show that when these articles are shipped to a mill they take the scrap iron rate; they always have and still do. We expect to show that the railroads are seeking to claim a larger and higher rate from us, the defendants here, because our clients put them to a different use. But the courts have held in numerous cases, clear up to the Supreme Court of the United States and back again, that the railroads may not prescribe a rate based upon the use to which we put that article. That, as your Honor will recall from the three-judge court hearing, is the bone of contention in this case.

The use to which they are put is not the criterion. The criterion and test is, what are these articles, not what use can you put them to, or what use do you put them to.

Mr. Houts: As I understand, the decisions are that the mere result is not controlling. The mere fact that they are used for this or that, or occasionally used for it, is not absolutely conclusive, but that the use that is ordinarily made of the particular articles is some evidence of the character of the article. For instance, in this case, if these rings are customarily reconditioned and sold, without remelting, that is some evidence that they are not articles in the scrap iron classification which are of no value except for remelting.

There will be other evidence to connect this up, that they are sold, and commercially sold, and are bought, but the [fol. 68] fact whether they are remelted or resold is some evidence of what they are.

Mr. Reeder: In addition to that, I want to read you three lines from an opinion on that particular question, in a case against these same defendants.

Mr. Rosenblum: If the Court please, I want to be heard on that issue. I maintain that, under the decisions in this circuit, they have no right to introduce this ruling of the Commission at all. It is not res adjudicata. It covered cars

separate and distinct from these cars, cars that moved long before these cars moved, and the Commission and the courts have said that that is not res adjudicata—

Mr. Reeder: That is not what I call the Court's attention to.

"The use to which a commodity is put is not determinative of the applicable rate but that use may be considered in determining the nature of the commodity", and that is what we are trying to show.

That is in 196 I. C. C., 459, 460, Division No. 5.

The Court: It is our usual time to adjourn, so we will adjourn until tomorrow morning. There is a criminal case that was passed over until tomorrow morning, but I rather anticipate that I will be able to go on with this case in the morning. That is my present understanding.

[fol. 69] Mr. Reeder: Our testimony will be very short. We have a number of witnesses; but they will be very short.

At this point an adjournment was taken until February 1, 1940, at ten o'clock A. M.

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[fol. 70] Met, pursuant to adjournment as above, on February 1, 1940, at ten o'clock A. M.

Appearances: Same as heretofore noted.

The Court: You may proceed with the case on trial.

N. A. ECKLUND, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the plaintiffs as follows:

Direct Examination.

By Mr. Reeder:

Q. Mr. Ecklund, do you feel well enough to testify?

A. I am pretty weak. It seems like—I will do the best I can.

Mr. Rosenblum: Your Honor, if this witness is not well I should think it would be better for him to testify at the end. He looks sick.



The Court: He certainly does not look well. He looks ill.

Mr. Rosenblum: Yes, he does.

Mr. Reeder: I think so. I am afraid to take a chance.

The Witness: I would like to see if I can't get this over and get home.

The Court: What is the matter with you?

The Witness: It seems like I am weak, my stomach. [fol. 71] I can't hardly eat and am breaking out in a sweat.

The Court: He probably ought to be at home. He doesn't look to be in a condition to testify.

What do you desire to do, gentlemen?

Mr. Houts: I think for the time being we will have to let him go to the hotel.

The Court: Can you not stipulate as to what this man will testify to?

Mr. Rosenblum: I don't hardly think so. There is a definite cleavage as to what the rate is as to some of these shipments.

Mr. Reeder: The tariff specifies what the rates are on these two commodities. It is just a question of locating the tariffs, and because the tariffs are so large and voluminous we feel—

(Here ensued colloquy among the Court and counsel.)

The Court: I do not think he should testify. Shall we pass this until this afternoon?

Mr. Reeder: Yes; your Honor.

The Court: I find that defense counsel in the criminal case which is to be tried is not here and will not be here for an hour. Do you want to go ahead with this case then?

Mr. Reeder: I think that will suit us very well.

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[fol. 72] Direct Examination of MICHAEL J. McGRANE  
(Resumed)

By Mr. Reeder:

Q. Mr. McGrane, when you were on the stand yesterday you testified concerning the inspection of the first car on July 31, 1937, and refreshed your recollection from your original report and told us what your inspection was.

'Now I show you Plaintiffs' Exhibit No. 2 and ask you to state whether or not that is the original report referred to by you yesterday, covering the inspection of the first car.

A. Yes.

Q. Talk a little louder. A. Yes, sir.

Mr. Rosenblum: May I see it?

Mr. Reeder: Yes (handing document to Mr. Rosenblum).

Q. Now I show you Plaintiffs' Exhibit No. 3 and ask you whether or not that is the original report referred to by you yesterday, covering the second car that you inspected. A. Yes, sir.

Q. Both of these are in your handwriting?

A. Yes, sir.

Q. Signed by you? A. Yes, sir.

Mr. Rosenblum: May I inquire of this witness as to these papers?

The Court: Very well.

Mr. Rosenblum: The book that you had in your hand yesterday, have you that here today?

The Witness: It should be there (indicating).

[fol. 73] Mr. Reeder: Here is the book, Mr. Rosenblum.

Mr. Rosenblum: You were reading from that book, were you, to refresh your recollection about these cars?

The Witness: The book record is made after we make the inspection.

Mr. Rosenblum: When is this paper made?

The Witness: Immediately after, the same day.

Mr. Rosenblum: Then the book record is made from this paper?

The Witness: Yes, sir.

By Mr. Reeder:

Q. You say you found iron thread protecting pipe rings in these two cars; is that correct? A. Yes.

Q. Were those rings fastened together, screwed together, or otherwise?

A. Some loose, some fastened together.

Q. You testified yesterday that they were all in an open car, loose and not in packages? A. Yes.

Q. They were loose? A. Yes, sir.

Q. Did you examine them as to the condition of the commodity, as well as to what the commodity was?

A. I looked over the car, yes, sir.

Q. What was the condition of these rings when you made your inspection of these thread—

A. Of used thread protecting pipe rings.

Q. I asked you what the condition was, what condition they were in.

A. Some were slightly rusted; some were greasy, and [fol. 74] some were with clay dirt.

Q. Besides being rusty or greasy or dirty, was their condition otherwise good? A. Yes, sir.

Mr. Rosenblum: That is objected to—

Mr. Reeder: You object to it because it is leading.

Q. Aside from being rusty and dirty and greasy, what was their condition? A. O. K.

Mr. Rosenblum: That is objected to as being a conclusion of the witness, O. K. being—

The Witness: We will make it good.

The Court: The Court has some idea of what you mean by O. K.

Mr. Rosenblum: O. K. for what?

Mr. Reeder: Mr. McCrane, during your many years—

The Court: Counsel has suggested O. K. as to what? I think that is a very proper inquiry.

Mr. Reeder: O. K. for what use, Mr. McGrane?

A. O. K.—

The Court: In what respect was it O. K.?

The Witness: For thread-protecting use.

By Mr. Reeder:

Q. During your many years of experience as an inspector, have you seen pipes passing through the yards and being shipped out on cars containing these protecting rings? A. Going out!

Q. Yes. A. I never seen a carload going out.

[fol. 75] Q. Have you seen them coming in?

A. Yes, sir.

Q. What were these rings used for?

A. For the protection of pipe in transit.

Q. Can you be a little more definite? What part of the pipe do they protect?

A. Protecting the threads.

Q. When the pipe reaches its destination, do you know whether or not the protecting rings are further used?

A. Well, I couldn't say as to when they arrive at the destination.

Q. But the purpose of the protector is to protect the threads of the pipe in transit? A. Yes, sir.

Q. Have you ever been in the defendants' plant?

A. On one occasion.

Q. About when was that, Mr. McCrane?

A. Well, I couldn't say exactly; about a year and a half ago.

Q. About a year and a half ago? A. About.

Q. Did you see the business operation in the plant?

A. Yes.

Q. Will you tell the Court just what you saw, just what you observed there at that time?

Mr. Rosenblum: That brings us down to the place where we were yesterday. I certainly want to object to the use to which this commodity was put after it arrived at the plant of our client. Its value ought to be determined at the time it was shipped, and not as to the use it was [fol. 76] put to after it arrived at our clients' plant.

Mr. Reeder: It is our contention, and we will prove, that these rings were bought in the field, returned here, and reconditioned, and sold for their original purpose.

Now, to be scrap iron, under the law, as declared by the tariff, it must be old, discarded material that has a value only for remelting. When we prove that these pipes were not remelted, but reused, we disprove that it was scrap iron.

The Court: Is not this the distinction: That you have a right to show the customary use of this particular type of material, but you can't show how a certain shipment was used which was—

Mr. Rosenblum: May I state our views? You can not show what the customary use of it is, because the courts have held—

The Court: Show me the most recent decision on that.

Mr. Rosenblum: The Wrought Washer case, in Interstate Commerce Commission—

The Court: Have you got it there?

Mr. Rosenblum: I haven't it in court. I have a citation from it that you might read.

Mr. Reeder: This the very latest case, I think. I think it is between these same parties, and here is the citation down here (handing document to the Court.)

[fol. 77] Mr. Rosenblum: That case never overruled the Wrought Washer case.

The Court (after reading citation): Read the question.

(Last previous question read as follows:

"Q. Will you tell the Court just what you saw, just what you observed there at that time?")

The Court: Objection overruled.

By Mr. Reeder:

Q. Proceed and answer the question, and talk loud enough so the Judge can hear you. The question is, What did you see them doing with these rings?

A. Well, the first operation was through a solution tank, a large tank—



Q. What do you mean by that?

A. Those rings were being dipped into a solution tank.

Q. Did you see what the dipping in the solution tank did, what it accomplished with the rings?

A. The dipping was—the threads were freed from mud and grease.

Q. In other words, the dipping cleaned the rings?

A. Yes, sir. Then they passed through another solution dipping and they were in fair shape.

Q. Then what was done?

A. Then they were passed on through machines for truing them up; in other words, the threads, to see that they were all right.

Q. Did you see the rings after they had passed through [fol. 78] these various reconditioning processes?

A. Yes.

Q. Describe them as best you can.

A. The first one—they were pretty well cleaned. The next one, they were cleaned, and the next they passed through this machine process of truing up.

Q. Truing up the threads? A. Yes, sir.

Q. After all of that was over, what was the condition of the rings? A. They looked very good.

Q. We don't know what you mean by that. Can you not be a little more definite, with reference to a new ring?

A. You couldn't tell the difference.

Mr. Reeder: I might state this, your Honor, that these two exhibits will be identified by another witness later as being rings taken from one of the cars referred to in this petition—not this particular car, but I want to ask this witness about them.

I show you Plaintiffs' Exhibit 4 and ask you what it is.

A. Thread protecting rings.

Q. You said you inspected two cars containing thread protecting rings: Were they of that description?

A. Varied.

Q. What do you mean by that?

A. From about twelve inches diameter, down to this size.

Q. Do you mean by that that they were all thread protecting rings, but of various sizes? A. Yes, sir.

[fol. 79] Q. Did you see rings like that, in the cars that you inspected? A. Yes, sir.

Q. You have two there together, one a larger one and one a smaller one: These are designated as male and female, are they not? A. Yes, sir.

Q. I show you Plaintiff's Exhibit 5, two sets of rings somewhat larger—about the same size? A. Yes.

Q. About the same size. These are thread protecting rings, are they? A. Yes, sir.

Q. And the commodity that you found in these two cars? A. Yes, sir.

Mr. Reeder: I will offer in evidence Plaintiffs' Exhibits 2 and 3, the reports of inspection made by this witness of the two cars which are covered by Counts 1 and 7.

Mr. Rosenblum: Note our objection to the introduction of these reports in evidence. The witness has testified from a book, having refreshed his recollection, and these two papers have no probative value.

The Court: Objection overruled.

Plaintiffs' Exhibits 2 and 3 are in words and figures as follows, to-wit:

See 4-2 valley stamping  
9/2/37  
enc

Form C-2  
**WESTERN WEIGHING AND INSPECTION BUREAU**  
STATEMENT OF CORRECTION

Inspector's No. *1917* *7/1/40*  
DATE *July 31 1937*

DISTRICT *San Fran*

BILLING REFERENCE *Met by Mont*

DATE *July 31 1937* W. B. No. *515*

Car Initial and No. *Exc 14999*

Line *7/1/40*

Capacity \_\_\_\_\_

W. B. No. *7/1/40*

Length \_\_\_\_\_

Route *Grumey*

Original Car \_\_\_\_\_

AS ORDERED BY DESIGNER, OR BILLED	AS ORDERED BY EXAMINATION	CLASS	RATE
<i>Grumey</i>	<i>Grumey</i>		
<i>Protectors</i>	<i>Protectors</i>		
<i>Scrap Iron</i>	<i>Scrap Iron</i>		
<i>Rough Enroute to</i>	<i>Rough Enroute to</i>		
<i>Dep. Protector</i>	<i>Dep. Protector</i>		
<i>No Authority</i>	<i>No Authority</i>		
<i>Weight 150880-16600-6080</i>	<i>Weight 150880-16600-6080</i>		

Tare or Classification Authority for Correction. *CRS*

R.R. *San Fran* Inspector *one*

Times of Cross are phoned  
me and told Cal about this  
and we got Mike to make an inspection  
so as to back up the no Revenue for  
Mike as #12 inspector at  
mine the mine inspector the  
had QMC 8/9/37







[fol. 80] Mr. Reeder: You may inquire.

Mr. Rosenblum: May I have a moment to inspect his book before I proceed, your Honor?

The Court: Very well. The witness will be on the stand for some time?

Mr. Rosenblum: Yes, your Honor.

The Court: You are not through with him, Mr. Reeder?

Mr. Reeder: I am through with him and have turned him over for cross-examination.

The Court: Can you let him go at this time and conduct the cross-examination this afternoon, Mr. Rosenblum?

Mr. Rosenblum: I have no objection.

The Court: Mr. Bailiff, you may announce that all parties and witnesses in this case of Lowden, et al. vs. Crancer, et al. are excused until two o'clock.

At this point, a recess was had until two o'clock P. M.

[fol. 81] After recess, on February 1, 1940, at two o'clock P. M., the following proceedings were had:

The Court: You may proceed again with the case of Lowden, et al. vs. Crancer, et al.

#### Cross-Examination.

By Mr. Rosenblum:

Q. Mr. McGrane, you have been working for the Western Weighing and Inspection Bureau, have you?

A. Yes, sir.

Q. For thirty-nine or forty years?

A. Thirty-nine.

Q. In all that time, Mr. McGrane, your duties were, I suppose, to look at freight cars or freight shipments, and see if they can not be labeled with such designation as will give them a higher rate than what they carried on their bill of lading or freight bill; is that correct?

A. Yes, sir.

Q. If a shipper ships something and you are asked to inspect it, you don't go there with an idea of giving him a lower rate, do you?

A. It is according to the classification they go on, as to what our findings are.

Q. These Western Weighing and Inspection Bureau people, the whole idea and aim and purpose of this organization is to inspect freight to see if the rate is lawful, so in the event you can, you give it a higher designation so it gets a higher freight rate?

A. Proper description of the articles.

Q. It would not do any good to inspect an article and [fol. 82] find it takes a lower description, or a description that takes a lower rate?

A. Proper description of the article is all.

Q. Did you ever in your life make an inspection when you inspected an article and mark it down as taking a lower freight rate than the one which was mentioned?

A. Several times.

Q. Several times out of how many inspections?

A. Well, I would say, offhand, maybe once every week or so.

Q. You give a lower rate to it?

A. In our findings on weights.

Q. On weights? A. Also classification.

Q. Who was the first person that told you that they wanted you to inspect this car?

A. Who was the first person?

Q. Yes; who told you to inspect it?

A. From our own observation.

Q. Did not the Rock Island ask you to inspect one of these cars?

A. Those cars were asked through the office.

Q. Through whom?

A. Through our office.

Q. In your notations of one of these cars, don't you have a notation that you were asked to inspect this Erie car by the Rock Island?

A. That is a verification.

Q. In your own handwriting on your report it says: "Inspection requested by Rock Island"? A. Yes.

Q. Is that correct?

A. It certainly must have been.

[fol. 83] Q. Did you ever inspect carloads of thread protectors before in your life? A. Yes, sir.

Q. When? A. At various times.

Q. Can you say when, before these in 1937?

A. The reports would show.

Q. Can you tell us from your recollection when?

A. Well, during the years of 1937, from the records.

Q. Before that, did you ever inspect any?

A. I suppose so.

Q. Can you be more definite, Mr. McGrane?

A. Well, not unless I could consult the records.

Q. Between now and tomorrow will you consult the records and see if you can find some?

A. My records are all filed at our office.

Q. Where is your office?

A. Room 405, 1218 Olive Street, Missouri Pacific Building.

Q. Have you access to those records?

A. I have, and they have also in the office. They are the ones that hold them.

Q. Did you ever inspect any carloads of this stuff as far back as 1926?

A. Not that I remember of.

Q. Do you remember any of them moving in traffic in 1926?

A. I couldn't say that.

Q. Do you remember a company known as the Allegheny Steel Company, here in St. Louis?

A. No, not that I remember.

[fol. 84] Q. Do you remember that they did the same thing with these thread protectors as the present defendants here?

A. I don't remember.

Q. Do you know that in 1926, as far back as 1926, 1927 and 1928, numerous carloads of these thread protectors were shipped to St. Louis? A. No.

Q. Do you know that they were shipped as scrap iron and the freight paid on them as scrap iron?

A. No, sir.

Mr. Reeder: That is objected to. If anything like that occurred it would be immaterial to any issue in this case.

The Court: Sustained.

Mr. Rosenblum: As far as you know, this is the first car in a long while that you had ever seen, this Erie car; is that right?

A. I saw various cars.

Q. Do you recall whether you changed the classification on any other cars besides these two?

A. Oh, several.

Q. Was it around about this same time?

A. Unless I consult the record—

Q. You can't answer? A. No.

Q. In fixing a classification, changing a classification, what do you go by, Mr. McGrane?

A. I don't understand that question.

Q. What basis do you have for changing the classification?

A. When we find that there are rings?

[fol. 85] Q. No; any car. A. Any car?

Q. Any car of any shipment, any merchandise.

A. It depends on the commodity.

Q. What do you have to use as a criterion or basis for changing the rate? A. Classification.

Q. Where do you get that from?

A. We always have one in our possession.

Mr. Reeder: I might suggest, if your Honor please, that these questions are immaterial, for the reason that this witness inspects only to determine the identity of the commodity and has nothing to do with fixing the rate or changing the rate or making the rates.

The Court: Objection sustained.

Mr. Rosenblum: I am trying to find out what basis he uses for changing the classification—

Mr. Reeder: That is objected to, for the reason that he has nothing to do with changing the classification. The commodity fixes the classification. His inspection is to determine what is in the car. When that is once determined they go to the tariff to determine the rate.

Mr. Rosenblum: According to Plaintiffs' Exhibits 2 and 3 here he says, and it shows, that the shipment was



billed as a carload of "discarded or used protectors scrap iron." He changes it to a carload of iron thread protecting pipe rings. He has already said that he has some [fol. 86] thing with him from which he makes this change. I want to show the basis of what that was that he had with him upon which he made this change.

Mr. Reeder: This report that counsel has called your Honor's attention to is a blank printed form and it has, on the left side, "As named by consignor, or billed." On that side he takes from the bill of lading the description of the commodity as billed.

On the right-hand side it says, "As found on examination", and the inspection is to determine whether or not the commodity is actually as billed, and what it is.

Now, as far as fixing the tariff or classification, or anything else, it is offered only for the purpose of showing what is in the car.

Mr. Rosenblum: But here is a commodity and he is showing your Honor the commodity as a sample. We billed it, or it was billed, as "Discarded or used protectors scrap iron." He has changed that classification and has testified to this change. He says that instead of scrap iron he found used iron thread protecting pipe rings. Where did he get that? He has already testified, without objection, that he had some book with him, or some data with him, that—

The Court: You may ask him.

By Mr. Rosenblum:

Q. What was that book or record which you had with you, from which you made this change?

A. The classification.

[fol. 87] Q. By "classification" you mean a tariff rate?

A. The classification—we were governed by that, and there is tariffs—as far as I understand, they are follow-up on classifications. I can't answer that question; plainly on tariffs, you understand, classifications we work under.

Q. Have you a copy of that here in court?

A. I think it is.

Q. May I see it, please?



The Witness (to Mr. Reeder): Have you a copy, Mr. Reeder?

Mr. Reeder: I am not sure that I know what you mean.

I don't know what the witness has reference to. We are not offering this testimony for any other purpose than to show the commodity that is in the car. As far as fixing the correct tariff is concerned, we will have an expert witness to prove that.

You are asking him about classification.

(To the witness) I don't know what you have reference to.

Mr. Rosenblum: He is the one who testified to it.

Mr. Reeder: The only one I have is this (indicating). Is that what you mean?

The Witness: No; it is in book form.

Mr. Reeder: Is this the book you have reference to (indicating)?

The Witness: No.

[fol. 88] By Mr. Rosenblum:

Q. I will show you a paper, or a book, rather, which I will ask the stenographer to mark as Defendants' Exhibit A— A. That is—

Q. (Continuing) —which is named on the outside, "Consolidated Freight Classification No. 11, Issued November 16, 1936, Effective December 24, 1936", and ask you if this is the book that you used. Do you want to look at it? A. No.

Q. You recognize it, do you?

A. I am familiar with it.

Q. Is this the book that you used in fixing a designation of this material? A. That is our guide.

Q. Will you point to something in that that guided you in fixing this material as you have designated in the changed classification? A. From scrap iron?

Q. Just point out, if you can, what there is in that book that induced you to change that classification.

A. Do you want the page and item number?

Q. Just point out whatever you can and answer my question. A. Page 216 (indicating on book).

Q. Will you please point out, or mention to us, rather, what there is in that book that induced you to change that classification?

Mr. Houts: That is objected to as not a fair question, your Honor. There is nothing in the book, he did not testify there was something in the book that induced him to [fol. 89] change it. He said he inspected the articles and described them, maybe, as in the book, but he didn't say the book made him change it.

Mr. Rosenblum: That is your testimony, not his.

Q. Go ahead. A. What is it?

Mr. Rosenblum: (to the reporter): Read the last question, please:

(Last previous question read to the witness as follows:

"Q. Will you please point out, or mention to us, rather, what there is in that book that induced you to change that classification?")

A. Page 216, Item 26.

Q. Will you read that?

A. Scrap, under the caption of "Iron or Steel not Copper Clad". It shows the official Illinois Southern and Western. On the official is R26. That is the rating.

In the Southern it shows 4th class. In the Western it also shows 4th class. Then we take it over here "Pipe fittings", page 291, Item 18. Under the caption of "Pipe fittings" it reads "Rings, thread protecting, iron or steel, in packages." The official and Southern is 4th class. The Southern is 6th and the Western is 4th.

Q. The first page was what page? A. 216.

Q. Which one was that that you read?

A. Here (indicating).

[fol. 90] Q. You haven't read quite all that was there on page 216, because there is a note 9, which I may read: "Ratings apply on scraps or pieces having value for remelting purposes only."

In making this change from this item which is on page 216, designated as "Scrap not copper clad" to the other

item on page 291, which was "Rings, thread protecting, iron, in packages", you came to the conclusion, did you, that these articles had some other value than for remelting purposes? A. Yes.

Q. Was that your conclusion? A. Yes, sir.

Q. And so for that reason you found some other classification under which they could come?

A. Pipe fittings, under that head there as thread protecting rings.

Q. Did you know anything at all about the value of those articles? A. No, sir.

Mr. Rosenblum: I move that this witness' testimony be stricken from the record as having no probative value to decide what this commodity was in this car, or in these cars.

He said that he changed the rating, or the classification, from one which was entitled "Scrap not iron clad in packages or pieces weighing each 50 pounds. Carload minimum weight, 50,000 pounds. Note 9. Ratings apply on scrap or pieces having value for remelting purposes only."

He changed that to the pipe fitting classification appearing on page 291, which reads: "Rings, thread protecting, iron, in packages."

[fol. 91] These were not in packages, but we will skip that. He changed that on the theory that this was not scrap iron, but it was pipe fittings.

(At this point the hearing was interrupted by the return of a jury with a verdict in a criminal case.)

The Court: We will return to our case again. You may proceed.

Mr. Rosenblum: I will state briefly the point I was making in my motion to strike out this witness' testimony. He changed this from scrap iron, which has no value for remelting purposes to pipe fittings classification. He just now testified that he has no knowledge whatever of the value of this material.

Under the case which we cited, the essential thing about scrap iron is that it has, and shall have, a commercial value for remelting purposes only.

The District Court in Kansas City, by Judge Otis, in the Sonken-Galamba case, that went to the Court of Appeals of this Circuit, said it mattered not that some of this material could be used again after reworking, but that the value involved was the commercial value. This witness changed its classification and introduced in evidence this paper or document. I move to strike out the document as not having any probative value in this case, and because this witness changed that classification without knowing the value.

[fol. 92] Mr. Reeder: We offer this inspection, your Honor, to determine the proper description of this commodity, what it was. We are not asking this witness to fix the classification. It appears that he is thoroughly capable of doing so, but we will do that by other testimony.

The Court: The motion is overruled.

Mr. Rosenblum: In order to change that classification you thought you knew something about whether or not this was scrap iron, did you?

A. There is a difference between scrap iron and pipe rings.

Q. Have you ever seen any scrap iron that contained pipe rings? A. No, sir.

Q. Did you ever see any carloads of material known as junk or scrap, that contained these rings?

A. No, sir.

Q. Don't you know that thousands of them are shipped every year, thousands of carloads of scrap are shipped every year, containing these rings? A. They may.

Q. I show you what has been marked as Defendants' Exhibit B and ask you to take a look at that and let the Court see it.

Did you see any rings in the car that looked like that?

A. Naturally, there would be.

Q. And you saw them?

A. Certainly; it couldn't be helped.

Q. If they were all like that would you call the car scrap iron?

A. If they were all like that?

Q. Yes. A. That would be natural, scrap.

[fol. 93] You would designate them scrap iron?

A. I would.

Q. In looking at these cars did you see them unloaded, or did you just walk across the top of them?

A. I have seen them unloaded.

Q. These two particular cars?

A. I can't answer.

Q. Did you not just walk across the top of these cars?

A. I do.

Q. They are filled up with these thread protectors, are they not? A. Of various kinds.

Q. You have no way of seeing what is underneath the top layer, have you?

A. From corner to corner.

Q. You may look down in some corner?

A. Four corners.

Q. Four corners, but you had no opportunity of seeing what was in there?

A. Not on any individual car, unless in the process of unloading them I have seen some.

Q. These two cars were not in the process of unloading, which you have testified about?

A. I don't think so.

Q. Could you now testify, under oath, that the scrap thread protectors which you saw in either of these cars were not just like this one that you now see, Defendants' Exhibit B?

A. I couldn't answer that question.

Q. In going over the top of the cars would you see anything like that (indicating Defendants' Exhibit C)?

[fol. 94] A. I never did.

Q. You never saw anything like that in your life?

(Witness nods, indicating in the negative.)

The Court: You must answer out, because the reporter has to take down your answer and she can not get those nods.

A. No.



Mr. Rosenblum: Now showing you this Defendants' Exhibit D: Would you say that that was a fair representation of some of the thread protectors you saw in that car?

A. Not all.

Q. Some of them. I want to caution you, Mr. McGrane—I don't want to be rude, but I would like for you to listen to my question and then answer it.

(Last previous question and answer read to the witness.)

A. Some of those (indicating Defendants' Exhibit D).

Q. Do you have any notion or idea of what these things are worth in their present condition? A. No, sir.

Q. In the condition in which you saw them in the car?

A. No, sir.

Q. You don't know whether they are worth one dollar, ten or fifty? A. No, sir.

Q. Do you have any idea of what percentage of these things can be reclaimed? A. No, sir.

Q. Do you have any idea of whether or not this particular Exhibit D that I show you could be reclaimed?

[fol. 95] A. I am not in the business. I couldn't say.

Q. Supposing you found a carload that contained thread protectors such as these Exhibits C and D, that I have shown you; suppose you found a carload of thread protectors that were like these Exhibits B and D here: Would you designate them scrap iron? A. No.

Q. What would you designate them? A. Pipe rings.

Q. And it would not matter that you told the Court before that if you found Exhibit B in a carload, rings like Exhibit B in a carload, you would call them scrap iron?

A. It was the other one.

Q. We will take this one here (indicating).

A. The first one.

Q. This is the first one.

A. It was the second one.

Q. This one, is that it (indicating)?

Mr. Reeder: The one down here on the floor (indicating Exhibit B) is the first one identified.

Mr. Rosenblum: Did you not tell the Court if you found these in the car you would call them scrap?

Mr. Reeder: I think he said this one (indicating).

Mr. Rosenblum: He said he never saw anything like that in one of those cars.

The Witness: That there one (indicating Defendants' Exhibit C).

[fol. 96] Q. You said you didn't find any of those in the car?

A. I never did.

Q. You told us that there were thread protectors in the cars like these (indicating)?

A. These were miscellaneous, all kinds.

Q. You found some in there like this, did you not?

A. There naturally would be.

Mr. Reeder: Do you mean as to condition or size or shape? Do you mean as to the condition that this one is in, or as to the size and shape? Make that definite.

Mr. Rosenblum: In the same condition that this is.

A. There is various kinds.

Q. And they are in various conditions?

A. Various conditions.

Q. You found plenty of them in that car in the same condition as Defendants' Exhibit B, did you not?

A. I couldn't say that.

Q. There were some like that?

A. Naturally, there would be.

Q. Now we are where we were when we began. If you found a whole carload like this what would you call them?

A. I never seen one.

Q. That is not the question. The question is, Mr. McGrane, if you found a whole carload like this, just like this, would you not call it scrap (indicating Defendants' Exhibit B)? Would you call this one scrap (indicating Defendants' Exhibit B)?

A. It is a pipe ring.

Q. But you call it scrap in this condition, don't you?

A. That would be left to an expert.

Q. But you are an expert in changing classifications, are you not? A. No, sir.

Q. But you changed this classification, did you not?

A. Yes.

Q. If you found a whole carload like Exhibit B, would you change the classification?

A. I would have to get authority from someone else.

Q. But you didn't do it on these two, did you?

A. No.

Q. So, now, Mr. McGrane, Defendants' Exhibits B and D, both of them, are fair representations of what you found in those cars, some of them?

A. Not a fair sample, no.

Q. It is a representation of some of them?

A. Of part, yes.

Q. In walking over the top of these two carloads, could you tell us, or tell the Court, how much of what you saw was like this, and how much was in better condition?

A. No.

Q. Could you tell the Court how much in the whole carload—have you any way of telling how much in the whole carload were like these two, or better (indicating Defendants' Exhibits B and D)?

A. No; I couldn't tell on those, because I would only see part of the car.

[fol. 98] The Court: Mr. Bailiff, you may announce a five minute recess.

(Here ensued a brief recess.)

Mr. Rosenblum: What kind of cars were these that you inspected?

A. Coal cars; gondolas.

Q. Ordinary coal cars. Is that the same kind of car that scrap iron is commonly packed in, or shipped in, open coal cars? A. Yes, sir.

Q. You have to protect them from the elements?

A. No, sir.

Q. Did you ever see pipe fittings shipped in an open coal car, before you saw these cars?

A. Open cars, you say; pipe fittings?

Q. Yes. A. No.

Q. How are pipe fittings shipped?

A. In car lots, in closed cars.

Q. That was the first time you ever saw pipe fittings shipped in an open coal car? A. Yes, sir.

Q. If you knew that this stuff had value for remelting purposes only, then you would not have changed the classification, would you?

Mr. Reeder: That is objected to. We are not offering this witness as an expert on classification, or changing classification, or making classifications. We are merely offering this testimony of the inspection to prove the commodity, [fol. 99] and any testimony of that type is improper.

Mr. Rosenblum: They have offered this witness to show that he did change it. They showed that he did change it, and offered the paper in evidence to show he made that change. Now I ask him if he knew that this commodity had value for remelting purposes only would he have made the change.

Mr. Reeder: We don't offer the paper for that purpose. We are not offering him as a witness on classification. We have other testimony concerning that. We merely offer the testimony to prove the proper description of the commodity, its condition, and so forth.

The Court: Objection overruled. He may answer.

Mr. Rosenblum: Shall I ask it again, or do you remember what the question was?

The Court: Read the question.

(Last previous question read as follows:

"Q. If you knew that this stuff had value for remelting purposes only, then you would not have changed the classification, would you?")

A. I don't know.

By Mr. Rosenblum:

Q. Do you mean to say that if you knew that was all it was for, for remelting purposes only, that you would have changed that classification?

A. In so far as valuation is concerned, I couldn't answer.

Q. What did you base your change on?

A. On what I had seen.

[fol. 100] Q. But you didn't know its value?

A. I know nothing about values.

Q. Suppose that this car that you examined was consigned to a mill—we will say to the Granite City Steel Company over here: Would you have changed the classification? A. I certainly would.

Q. Even though they remelted it?

A. I don't know anything about the remelting.

Q. Even though it was used for only remelting?

A. I don't know anything about that.

Q. Even if it had value only for remelting purposes and was consigned to a mill to be remelted?

A. I don't know anything about that.

Q. You don't get my question. Would you have changed that classification even if these protectors that you saw were consigned to a mill and had value only for remelting purposes?

A. I certainly would change it to pipe rings.

Q. For what reason?

A. Because they are still a pipe fitting.

Q. Under your theory of this thing, as long as a piece of metal once was a pipe fitting it always is that?

A. It is still a pipe fitting.

Q. And always will take the pipe fitting rate?

A. It certainly will.

Q. And never will take the scrap iron rate?  
[fol. 101] A. I couldn't answer that.

Q. You don't know that. It couldn't take both of them; it would have to take one or the other?

A. Pipe fitting.

Q. This Exhibit B and D—

The Court: I don't think he understood.

By Mr. Rosenblum:

Q. It is always pipe fittings, then?

A. Certainly.

Q. Is there any condition, or any conceivable condition in which you could designate a carload of these things, even though they couldn't be reconditioned at all, as scrap?

A. I have never had a carload.

Q. Let me ask you: As an expert and as a man who has changed classifications for forty years, if you had—



The Court: The witness apparently says he never had a carload.

By Mr. Rosenblum:

Q. Anyway, Mr. McGrane, let us take the impossible in your view: If you saw a car of these things there is nothing on earth that would ever give you the authority, or nothing in your mind, that would ever permit you to label them or class them as scrap iron, even though you knew that not a single one could be reconditioned and used for the purpose for which it was originally intended?

A. Not being an authority on that, and an expert.

Q. Have you finished?

A. Not being an authority and expert there, I couldn't pass on it.

Q. If my memory serves me right, either this Exhibit [fol. 102] B or D you called scrap iron, did you not?

A. That other piece.

Q. Let us get at this. This you called scrap iron (indicating)? A. Yes.

Q. This Exhibit C—this you would call scrap iron?

A. Yes.

Q. But you didn't see anything like that in those cars?

A. No, sir.

Q. Then we can forget this for the time being. Take Exhibits B and D: Would you call either of those scrap iron? A. I never had a carload of those.

Q. Take Exhibit B.

A. I couldn't pass on that, not being an expert.

Q. Will you call that scrap iron?

A. I can't pass on that.

Q. Don't you remember that a few minutes ago, in answer to a question of mine, you called it scrap iron?

A. I misunderstood the question.

Q. Now you don't call it scrap iron?

A. I wouldn't call it scrap iron, no.

Q. What would have to happen to Exhibit B before you would call it scrap iron—I will withdraw that question. Could anything happen to this particular piece here before you, before you would call it scrap iron, or would you always call it thread protector?

A. If it was similar to the other article, this would be scrap.

[fol. 103] Q. Similar to what article?

A. The first one.

Q. It would have to be made up like Exhibit C?

A. Yes, sir.

Q. And then is when you would call it scrap iron and it would not matter to you whether it had a value for remelting purposes or whether it had a value for reconditioning purposes?

A. I am not an authority on valuation.

Q. So, that wouldn't make any difference to you?

A. I am not an authority on valuation.

Q. I say, it would not make any difference to you whether this Exhibit B and Exhibit D could be reconditioned or not, in determining in your mind whether it was scrap iron or pipe fittings?

A. The question is kind of confused.

Q. I will ask it over again and see if we can get it straight. Is there anything that could happen to Exhibit B that would, in your opinion, make it scrap iron?

A. Break it.

Q. Is that the only thing?

A. That is the only thing.

Q. And nothing else that could happen to this Exhibit B would make scrap iron out of it?

The Court (to the witness): Answer so the reporter can get down your answer.

A. No.

The Court: Read the question.

[fol. 104] (Last previous question read to the witness.)

The Witness: Unless broken up.

By Mr. Rosenblum:

Q. It would not matter if it was pitted, so that there were holes in it? A. I never seen one.

Q. Suppose it was so pitted that it had holes in it—you never have seen one like that. It would not matter whether the threads were completely rusted off?

A. No.

Q. It would still be a thread protector?

A. Yes, sir.

Q. And still would be classified as used protecting rings, even if all the threads were rusted off?

A. Yes, sir.

Q. Is your answer yes? A. Yes, sir.

Q. It would still be a thread protector and still take the thread protector rate, in your opinion?

A. As I said before, I have never had anything like that.

Q. Mr. McGrane, have you any recollection, by looking at Exhibits B and D again, of how much of that car contained stuff that was similar to these Exhibits B and D, that you could see?

A. No recollection.

Q. As to either car. Do you know the Pittsburgh Screw and Bolt Company? A. No.

The Court (to the witness): Talk out, so the reporter can get your answer.

A. Do I know—

[fol. 105] Mr. Rosenblum: The Pittsburgh Screw and Bolt Company. Did you ever hear of them?

A. No, I never heard of the Pittsburgh.

Q. Do you know the people who make these thread protectors new?

A. No; I can't answer that I do. I wouldn't be able to answer that, because I don't know.

Q. Do you know Mr. Donnelly, who is in court?

A. I met him on one or two occasions.

Q. Isn't it the Pittsburgh Screw and Bolt Company that asked you to change your classification of this stuff?

A. Not me.

Q. Whom did they ask?

A. I couldn't say that.

Q. Do you know if they asked anybody?

A. I couldn't say that.

Q. Isn't it true that these cars, and dozens of these cars, moved for a long time and always took the scrap iron rate, and just before you made your inspection the Pittsburgh Company, which was the manufacturer of these protectors, requested the railroads to see that these rates be raised?

A. I never knew nothing of it.

Q. You don't know of that at all? A. No, sir.

Q. You never heard of it? A. No, sir.

Q. You never had any conversation with the Pittsburgh Screw and Bolt Company, or any of their officers or attorney?

A. The Pittsburgh Screw? I don't know who they are.

[fol. 106] Q. I see. That is all.

### Redirect Examination.

By Mr. Reeder:

Q. As you recall your inspection of these cars can you tell the Court whether the commodity, the rings that were in these cars, were, on the whole, as you saw them, about like Plaintiffs' Exhibit 4, of different sizes?

Mr. Rosenblum: I object to that, your Honor. He has already testified that he couldn't tell how much of this Exhibit B and Exhibit D were in there.

The Court: Read the question.

(Last previous question read to the Court.)

The Court: He may answer.

Mr. Reeder: Do you understand the question?

A. The question was, was there?

The Court: Read the question again.

(Question again read to the witness.)

A. No. You had reference to those others?

Mr. Reeder: I am talking about this one.

A. This one is good.

The Court: You say that one is good?

The Witness: Yes, sir.

Mr. Reeder: I don't think you understood my question. This Exhibit 4—

Mr. Rosenblum: This is his own witness, and I object to his cross-examining his own witness.

[fol. 107] Mr. Reeder: I am not cross-examining him.

Q. I will show you a ring, a thread-protecting ring, which has been marked by the reporter as Plaintiffs' Exhibit 4, the one that I am holding in my hand now. Will you tell the Court, if you can recall, whether or not the rings that you saw in these two cars were, on the whole, about like the ring that I am showing you? A. They were.

Q. And the condition of the rings that you saw in these cars, how did that compare with the condition of this ring that I am now handing you, Exhibit 4?

Mr. Rosenblum: That is objected to for the same reason. He stated he had no recollection. I showed him these rings and he saw that one (indicating) and he couldn't tell what percentage were like I showed him, Exhibits B and D.

Mr. Reeder: He saw this ring this morning before he saw these rings.

Mr. Rosenblum: Of course, the record shows that I showed them to him earlier.

Mr. Reeder: Do you understand the question?

A. The majority were good.

The Court: The majority of what?

The Witness: The majority of rings.

The Court: What do you mean by "good"?

The Witness: In other words, the whole car.

The Court: The whole car?

[fol. 108] The Witness: Yes, with the exception, you might say, of a few that would be in a condition of that kind.

The Court: You only saw those on the top?

The Witness: Yes, your Honor.

The Court: You didn't—

The Witness: Only through the corners where you could see.

The Court: Very well.



Mr. Reeder: How far down did you actually go in the car in making this inspection; how far down could you see, or did you attempt to see?

Mr. Rosenblum: That is objected to for the reason that it is repetition.

Mr. Reeder: I withdraw that.

Q. Did you examine only the rings on top, or did you go down in the car? Did you make holes down in the car, to determine? A. No.

Q. Tell us, then, what you did do.

A. We look at the corner of the car and see as far as you possibly can.

Q. And how far is that?

A. Well, I would say maybe about two foot, wherever the openings would be. They are thrown in loosely, and as far down as you could see, and walk over the top of the car and you could see on both sides and all along. I have also seen cars unloaded.

[fol. 109] Q. Those cars that you saw unloaded were not these two cars that you inspected, were they? A. Oh, no.

Q. The cars that you saw unloaded, what was the commodity in those cars?

A. On the same order as those; various sizes, you understand.

Q. Rings similar to this one which I am holding, Defendants' Exhibit 4? A. Yes, sir.

Q. Those are iron thread protecting rings, are they?

A. Yes.

Q. Where were they unloaded?

Mr. Rosenblum: That is objected to—

Mr. Reeder: I think he testified they were unloaded at the defendants' plant.

Mr. Rosenblum: I didn't hear him.

Mr. Reeder: Where were they being unloaded, these cars that you saw unloaded?

Mr. Rosenblum: They may be some other cars that have no bearing on this case at all. They may be an entirely different group of these thread protectors. Unless they can show that these were cars involved in this complaint, I think that question is wholly improper.

The Court: I think so, too.

Mr. Reeder: We are going to show that there were a great number of these cars—these rings were used for a definite purpose and were in about the same condition.

[fol. 110] Mr. Houts: Used for the same purpose and treated the same way.

The Court: Could he show they were all in the same condition?

Mr. Reeder: We will show that those rings are made—where they are made, what is done to them, and how they are returned. It is a very definitely known descriptive commodity. It is not this particular car, it is the whole course of dealings.

Mr. Rosenblum: We are engaged in trying to find out what was in these particular eight cars. If this witness saw some other cars unloaded those cars might have had some commodity—

The Court: I think if you show anything at all you have to show they were exactly the same.

Mr. Reeder: I will ask you this: The cars that you saw unloaded—

The Court: Any of these cars?

Mr. Reeder: Not these two cars, and I can't show they were the cars involved in this lawsuit. I don't believe I can show that, but they were other cars of the same type and kind of rings.

Mr. Rosenblum: What he is going to ask now, as I gather from the drift of his questions, is, are not those cars that you saw unloaded—don't they, for the most part, contain rings that are in this shape as this exhibit, this beautiful shape?

The Court: Objection sustained.

[fol. 111] Mr. Reeder: I don't know that I have made myself plain, I was going to offer that testimony to show that the rings, as they were unloaded, were not the same kind all the way through the car; for instance, they did not just pick out the best looking rings and put them at the

top of the car for inspection, and the scrap iron at the bottom. That was not the way they loaded the car.

It is for that purpose that I offer the testimony.

Mr. Rosenblum: I object to that offer of proof and also object to counsel's statement, especially this last statement, as far afield from the issue before the Court.

The Court: Sustained.

Mr. Reeder: That is all, sir.

### Recross Examination.

By Mr. Rosenblum:

Q. You said, if I remember correctly, this morning when you were testifying, that you saw these thread protectors down at the Valley Steel plant and you saw the process they went through, that they were put into a vat of some kind of chemical?

A. Yes, sir.

Q. And did you not tell the Court that the rust and dirt and clay was taken off in that process; did you tell that to the Court this morning?

A. I might have said that, and at the same time I know they had passed through that, because I had seen them on occasions.

[fol. 112] Q. And the purpose of that is to take off rust and dirt and grease, and whatever may be on them?

A. Evidently, yes. I don't know.

Q. Did you see some of them that were rusty and greasy and dirty go into that vat?

A. Well, I wouldn't answer that question, because— they were taken up promiscuously.

Q. And put in there? A. Yes, sir.

Q. Did you see them come out of that process without the rust? A. Certainly.

Q. As it is rusted on this exhibit, Plaintiffs' Exhibit 4?

A. I couldn't say on that. I am not an expert on this.

Q. Looking at it, you know what rust is.

A. It was on the outside, if there was any rust.

Q. That looks like it has been put through that process? A. No, sir.

Q. It doesn't look that way. You saw them go after the threads, did you not? A. Yes, sir.

Q. What did they do with the threads?

A. I couldn't say that. They were put on a machine and passing through on the threading, or something.

Q. The purpose was so that they would be able to be screwed on to a piece of pipe again?

A. Evidently, yes.

Q. This one screws very freely off and on: There is no rust inside there at all?

A. It don't look like it.

[fol. 113] Q. You can take them and very readily screw one on to the other, can't you? A. Yes, sir.

Q. Do you know whether or not this exhibit that you have been shown by your attorney, Plaintiffs' Exhibit 4, went through the process of reconditioning?

A. Not being an expert, I couldn't answer that question.

Mr. Rosenblum: That is all.

Mr. Reeder: That is all.

JAMES R. TIMMONS, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the plaintiffs, as follows:

#### Direct Examination.

By Mr. Reeder:

Q. State your name, please.

A. James R. Timmons.

Q. Where do you live?

A. 5210 Itaska Avenue.

Q. What is your business?

A. Clerk, Western Weighing and Inspection Bureau.

Q. How long have you been so employed?

A. Twenty-three years.

Q. Twenty-three years? A. Yes, sir.

Q. What are your duties?

A. Why, various in the general line. At present I am in charge of all the supervising—cars and scales; and I go around through the various yards.

Q. The Western Weighing and Inspection Bureau does [fol. 114] inspecting work for all the railroads in St. Louis, does it not? A. Yes, sir.

Q. And throughout the Western District?

A. Yes, sir.

Q. And you are one of those inspectors? A. Yes, sir.

Q. I will ask you whether or not you made an inspection of certain cars for the purpose of determining what was in those cars. A. Yes, sir.

Mr. Rosenblum: What count is this under?

Mr. Reeder: This relates to Count 2.

Q. I show you a paper that has been marked Plaintiffs' Exhibit 6 and ask you to state what it is.

A. Copy of a report covering an inspection made by me on July the 30th, 1937.

Q. Where was that inspection made?

A. At the Rock Island yard at Carrie Avenue, in North St. Louis.

Q. How did you happen to make that inspection, were you requested to do so?

A. I was requested to do so.

Q. And by whom were you requested to do so?

A. By the Rock Island Railroad.

Q. You said that is a copy of a report: Is that a copy or the original? A. That is a copy.

Q. It is a signed copy, is it not? A. Yes, sir.

Q. Does it bear your signature? A. It does.

Q. That is made out on a form of the Western Weighing and Inspection Bureau, is it not? A. Yes, sir.

[fol. 115] Q. Refer to that for the purpose of refreshing your recollection, and then answer this question: What did that car contain?

Mr. Rosenblum: I suggest that you identify the car by number, will you please, Mr. Reeder?

Mr. Reeder: Yes.

Q. What is the number of that car?

A. CRI&P 188165.

Q. What was the point of origin of the shipment?

A. Wickett, Texas.

Q. To what point? A. St. Louis, Missouri.

Q. Will you give us the date of the shipment, if you can?

A. This shipment was July 26, 1937.



Q. On what date did you make your inspection at the Carrie Avenue yard?

A. July the 30th, 1937.

Q. When was that report made which you hold in your hand?

A. That was made the same day.

Q. That was made the same day? A. Yes, sir.

Q. Can you refer to that report and tell us what that car contained?

A. It contained iron thread protecting rings of various sizes, loose.

Q. You say they were loose? A. Yes, sir.

Q. In what kind of a car, open or closed? A. Open.

Q. An open car? A. Coal car equipment.

Q. These iron thread protecting rings were not in [fol. 116] packages but were all loose, is that correct?

A. Yes.

Q. On the left-hand side of this report, printed, is the following—

Mr. Rosenblum: I object to its being read, which is equivalent to its being introduced in evidence.

Mr. Reeder: I offer it in evidence.

Mr. Rosenblum: I object to its being offered in evidence. It has no probative value here.

Mr. Reeder: It is the same as the other two that have been admitted in evidence.

Mr. Rosenblum: I don't believe it has any probative value to prove any facts here. There has been no foundation laid for the witness—

The Court (after examining Plaintiffs' Exhibit 6): Objection sustained.

Mr. Reeder: You speak of this (indicating Plaintiffs' Exhibit 6) as being a copy: I will ask you to look at it again and see whether or not it is a copy. It looks like an original. Is it an original or a copy?

Mr. Rosenblum: I didn't make any objection, for that reason. I don't want to raise that point.

Mr. Reeder: All right. What is the reason for your objection?

Mr. Rosenblum: I stated it for you and the Court sustained it.

[fol. 117] Mr. Reeder: May I ask your Honor to reconsider your ruling?

The Court: Yes.

Mr. Reeder: May I ask a few questions?

Q. State whether or not this report is one of the records which the Bureau keeps, covering the inspection made of this car.

Mr. Rosenblum: That is objected to as having no probative value, whether it is a record that his Bureau keeps or not. The record itself has no probative value.

Mr. Reeder: This man is in the same position as the other inspectors. They make many inspections and no one could remember offhand just what was in every car that he inspected.

The Court: You expect to show by this man that he made this inspection?

Mr. Rosenblum: He already so testified, but, this paper—

Mr. Reeder: He made an inspection and made this report, and on the same day that he made the inspection he recorded on this record, which is their permanent record, the result of his inspection.

Mr. Rosenblum: That is no proof of it, and he offers this document in evidence.

The Court: Sustained.

Mr. Reeder: Can you refer to this report and refresh [fol. 118] your recollection, and testify exactly what was in that car?

Mr. Rosenblum: I object to that, your Honor. In the first place, the witness has already testified to it. He said they were iron thread protecting rings, as I recall. It is repetition, purely and simply. In the second place, this man is not qualified to testify as to the nature of this commodity.

The Court: He may answer. Read the question.

(Last previous question read.)

A. Yes; it was a carload of iron thread protecting rings of various sizes.

Mr. Reeder: Did you take any sample of any of the rings from these cars?

A. I did, out of another car.

Q. What was the condition, as you recall, of the iron thread protecting rings in this particular car?

A. From my observation, they were in very good condition.

Mr. Rosenblum: That is objected to, and I move to strike out the answer as a conclusion.

The Court: Sustained.

Mr. Reeder: With reference to being damaged, or otherwise, what was their condition?

Mr. Rosenblum: That is objected to on the ground that it is leading and suggestive.

The Court: Overruled.

Mr. Rosenblum: May I make a further objection that occurs to me?

[fol. 119] The Court: Yes.

Mr. Rosenblum: I object to that, for the reason that that question is not conclusive, or not controlling in this situation, whether they were damaged, or not.

The Court: He may answer.

Mr. Reeder: Answer the question. Tell us the condition these rings were in, as best you can.

The Court: I might inform the witness that I can not hear him unless he speaks out.

A. The condition of them? They were very good.

Mr. Reeder: That is your conclusion, and nobody knows what you mean by that, so that may be stricken out. Were they screwed together, were they in pieces or whole,

or can you give us some idea of what condition, without saying they were good?

A. They were all in their original shape. There were some screwed together. There was no broken ones.

Q. From your observation and experience were they in such a condition as that they could be used?

A. They were usable.

Mr. Rosenblum: Just a second, please. I object to that question, for the reason that it has no value, and does not tend to prove or disprove any issue in this case. It violates the ruling of the Supreme Court, that the use of the material can not be any criterion as to rating.

The Court: Read the question.

(Last previous question read to the Court.)

[fol. 120] The Court: Objection overruled. The witness may answer.

Mr. Reeder: Go ahead, Mr. Witness.

Mr. Rosenblum: I would like to object again, because this witness is not qualified to testify as to whether they could be used for the original purpose. They may be able to verify it.

The Court: He may answer.

By Mr. Reeder:

Q. Mr. Timmons, tell the Court whether or not you have ever seen these rings actually in use.

A. Yes, I have, in shipments—

Q. Turn around and tell the Court.

A. From shipments of pipe going out into the oil fields.

Mr. Rosenblum: In a shipment of new pipe with new thread protectors?

The Witness: Yes, sir.

By Mr. Reeder:

Q. What is a thread protector, what is its function?

A. It is put on the ends of pipe to protect the threads in its movement from the shipper to the consignee out in the oil fields, so as not to damage the threads of the pipe.

Q. Then those protectors are removed, brought back, and reconditioned—that question may be leading. I withdraw it.

With reference to the commodity, the rings that were in this car that we are speaking about, how did they compare as to condition with this ring that I am now showing you, which is Plaintiffs' Exhibit 4?

[fol. 121] A. There were lots—

Q. Can you take that ring and give the Court some idea of what the condition of those rings in this car was?

A. Well, there was a large amount of these in this car here in question. There were also different kinds; some of various sizes:

Q. Were they all rings?

A. Yes, they were all rings, the thread and everything in good condition.

Q. State whether or not any of them had rust on them and dirt and mud on them, and whether some did and some did not. Just tell us what the facts were in that connection.

A. Well, some of them had dirt on them; some of them were rusty, and some of them possibly had oil, dirty oil, on them, and mud.

Mr. Reeder: I ask that this paper be marked as Plaintiffs' Exhibit 7.

(The paper indicated by counsel was thereupon marked Plaintiffs' Exhibit 7.)

Q. I show you a paper that has been marked Plaintiffs' Exhibit 7, and ask you to state what that is.

A. It is a report covering an inspection made by me on Missouri-Pacific car 73665.

Q. When was that inspection made?

A. That was made on August 13, 1937.

Q. What was the point of origin?

A. Kilgore, Texas.

[fol. 122] Q. And the point of destination?

A. St. Louis, Missouri.

Q. And shipped when?

A. Shipped on August 6th.

Q. When did you inspect it?

A. August 13, 1937.



Q. Where did you inspect it?

A. Rock Island yard, at Carrie Avenue.

Q. Was that an open or closed car? A. Open car.

Q. What did that shipment contain?

A. Iron thread protecting rings of various sizes.

Q. Were they in packages or loose in the car?

A. They were loose in the car.

Q. Did you take a sample from that car?

A. Yes, I did.

Q. Which is it? A. This one (indicating).

Q. I show you an exhibit which has been marked Plaintiffs' Exhibit 5, and ask you what it is, sir.

A. Iron thread protecting rings out of this car.

Q. You took those two sets of rings out of this car?

A. Absolutely, yes.

Q. You have a card on those rings? A. Yes.

Q. Tell us what that card is and who put it on.

A. I did.

Q. What does it contain?

A. It contains the car number, date of inspection, and also where the inspection was made.

Q. That is in your handwriting?

A. Yes, it is.

Q. Do these two rings, marked Plaintiffs' Exhibit 5, fairly represent the commodity that was in that car?

A. Yes, sir.

Mr. Reeder: These are the two, your Honor (exhibit [fol. 123] ing rings to the Court).

Q. Did you take samples from all the cars that you inspected? A. No, sir; I did not.

Mr. Reeder: I offer in evidence Plaintiffs' Exhibit 5, the two rings in question.

Your Honor, I want also to offer in evidence Plaintiffs' Exhibit 7. It is practically the same as the exhibit that your Honor excluded before.

Mr. Rosenblum: That is objected to for the same reason as previously stated.

The Court: Sustained.

Mr. Reeder: Exception.

Plaintiffs' Exhibit 6 refers to Count 2 and Plaintiffs' Exhibit 7 refers to Count 3.

Mr. Rosenblum: And this new one is Plaintiffs' Exhibit 8?

Mr. Reeder: Plaintiffs' Exhibit 8.

Q. I show you a paper that has been marked by the reporter as Plaintiffs' Exhibit 8, and will ask you to state what that is.

A. That is a report made by me covering inspection on TP car 17541.

Mr. Reeder: That is Count 6.

Q. When was that inspection made, and where?

A. That inspection was made at the Rock Island yard on Carrie Avenue, on August 30, 1937.

Q. Can you give us the point of origin of that car?

A. Odessa, Texas.

[fol. 124] Q. And the point of destination?

A. St. Louis, Missouri.

Q. Date of shipment? A. August 23, 1937.

Q. What did that car contain?

A. Iron thread protecting rings, loose, various sizes.

Q. They were loose and not in packages?

A. Yes, sir.

Q. And of various sizes? A. Yes.

Q. The rings that were in that car, as to condition and so forth, how did they compare with the rings that have been marked here as Exhibit 5, taken from the previous car?

A. Very favorable; in good condition.

Mr. Rosenblum: I object to that and move to strike it out as a conclusion of the witness.

Mr. Reeder: A "good" condition is a term that is so generally used—I think I know what it means, and I am sure the Court does.

Mr. Rosenblum: I wouldn't be so sure about the Court.

Mr. Reeder: We so frequently say that a thing is in a good condition or a bad condition. It is, in a way, a conclusion, but it has some value.

The Court: Objection sustained.

Mr. Reeder: Exception.

Q. Can you tell us, with reference to these two rings that have been marked Exhibit 5, were the rings that were in this car similar to those rings?

Mr. Rosenblum: That is objected to as being too far [fol. 125] afield, "similar to". They may be similar to—

The Court: Sustained.

Mr. Reeder: Is there any way that you can tell us, without stating your conclusion, what the condition of the rings in this particular car was?

A. I would say that they could be made usable.

Mr. Rosenblum: I object to that and move that this answer be stricken out, unless this witness knows of his own knowledge about them. If he has no knowledge of the process through which these rings go when they are reconditioned, or doesn't know whether they can be reconditioned or not, he should not be permitted to give his conclusion.

The Court: I don't think he has been qualified.

Mr. Reeder: A ring that screws on a pipe is such a simple thing.

The Court: But whether or not it can be reconditioned might be a simple matter to some man engaged in this business, but the witness may not know.

Mr. Reeder: State whether or not in your opinion the great majority of these rings that you saw in this particular car about which you are speaking, were in such condition that they could be used in their present condition.

Mr. Rosenblum: I object to that unless he is qualified.

The Court: Sustained.

[fol. 126] Mr. Reeder: With reference to whether they were in whole or in parts, what are the facts; whether they were in whole, altogether, or broken pieces.

Mr. Rosenblum: You mean, each individual ring?

Mr. Reeder: I will get at it that way.

Mr. Rosenblum: I don't want to prolong it, but I would like to have Mr. Reeder ask, or I will ask, whether he saw what was in these cars, or just walked across the top of them like the other witness did.

Mr. Reeder: How much of this commodity did you see, Mr. Timmons?

A. When I made the inspection of them I dug down and picked them up and rooted around through the car, probably down to about one and a half or two feet down underneath the top of the car, and looked down.

Mr. Rosenblum: Every car that you inspected?

The Witness: Every car that I inspected, yes, sir.

By Mr. Reeder:

Q. With reference to being screwed into each other, what are the facts; did you notice whether there were rings screwed together, or not? A. Yes, there was.

Q. Did you see any of these protectors rusted so badly as to have holes in them? A. No, sir.

Q. Did you see any of them bent, so as to be out of round? A. No, sir; I did not.

Q. You saw many of them, you say, screwed together?

A. Yes, sir.

Q. Did you see any of them broken in pieces?

A. No, sir.

[fol. 127]. Q. Is that all the inspections you made?

Mr. Houts: No; there is one more car.

(Here ensued private colloquy between Mr. Houts and Mr. Reeder.)

Mr. Reeder: Here is one. This covers Count 8.

Q. I show you a paper that has been marked Plaintiff's Exhibit 9, and ask you to state what that is, sir.

A. It is a report made by me covering inspection of a car, Missouri Pacific, 72396, in the Rock Island yards.

Q. When was it made; when did you make the inspection? A. September the 2nd, 1937.

Q. Date of shipment?

A. Date of shipment was August 28th, 1937.

Q. And point of origin? A. Beaumont, Texas.

Q. Destination? A. St. Louis, Missouri.

Q. What was in the car?

A. Iron thread protecting rings, various sizes, and loose.

Q. Were there any in packages? A. No, sir.

The Court: Were there any in what?

Mr. Reeder: In packages. The tariff deals with rings that are shipped in packages.

The Court: I couldn't get the word.

Mr. Reeder: How did the condition of the rings in this car compare with the condition of the rings in the other cars that you mentioned?

[fol. 128] Mr. Rosenblum: I will ask that the witness be cautioned to answer the question without giving any conclusions.

By Mr. Reeder:

Q. Can you tell us, Mr. Timmons, what was the condition of the thread protecting rings in this particular car?

A. They were all in one piece; there was none of them damaged, and they were in their original shape and form.

Q. Original shape and form? A. Yes, sir.

Q. Were any of them screwed together? A. Yes, sir.

The Court: It is now the usual time for adjournment.

Mr. Bailiff, you may announce an adjournment until tomorrow morning at ten o'clock.

At this point, an adjournment was taken until February 2, 1940, at ten o'clock A. M.

February 2, 1940.

10:00 A. M.

Note:

Due to other business of the Court, the further proceedings in this case were postponed until February 2, 1940, at two o'clock P. M.



[fol. 129] On February 2, 1940, at two o'clock P. M., the trial of the cause was resumed as follows:

Present: Same parties as heretofore noted.

The Court: You may proceed.

Mr. Reeder: At this time, if your Honor please, the plaintiffs ask leave to make certain amendments to the petition, consisting of a revision of figures, and all of them are downward.

I will give the Clerk a memorandum. There are six counts in which we want to change the amount sued for, and we are dismissing and striking Count 8 from the petition.

We have furnished counsel with the figures and I will give the Clerk a memorandum.

The Court: There is no objection to that?

Mr. Rosenblum: We can not object to that.

Mr. Reeder: The net result is a saving to the defendants of seven hundred dollars.

Direct Examination of James R. Timmons Resumed.

By Mr. Reeder:

Q. Mr. Timmons, reference was made to certain examinations and inspections of cars at Carrie Avenue: Where is Carrie Avenue? A. In St. Louis.

Q. In St. Louis?

A. It is around—let me see if I could judge right in a rough guess—it is about 6000 North Broadway, right there at the north end of O'Fallon Park.

Mr. Rosenblum: Is that where Kerry Patch gets its [fol. 130] name?

The Witness: No; it is in north St. Louis, about the north end of O'Fallon Park.

By Mr. Reeder:

Q. Mr. Timmons, do you know Mr. A. E. Stohlman?

A. Yes.

Q. Who is Mr. Stohlman?

A. Mr. Stohlman is an employee of the Western Weighing and Inspection Bureau.

Q. Do you know how long he has been employed by the Bureau? A. About twenty-three years.

Q. Was he an inspector in 1937? A. Yes, sir.

Q. Do you know where he is today?

A. Mr. Stohlman is home sick in bed.

Q. Do you know whether or not he was here Tuesday and Wednesday of this week? A. He was here.

The Court: Was he the gentleman who was sick on the witness-stand?

Mr. Reeder: No.

The Witness: He was here Tuesday and Wednesday, and Wednesday night he went home sick on the street car with me, after coming from the doctor.

Q. Are you familiar with Mr. Stohlman's signature, his writing? A. Yes, sir.

Q. The reports that you inspectors make covering the inspection of these cars, state what is done with those reports and how they are kept by the Bureau.

[fol. 131] A. They are filed permanently in our records over in the office, in the filing cabinet, under designated files.

Q. When the inspection is made, can you tell the Court whether or not reports are made at the time, right after the inspection? A. Yes, sir.

Q. In all cases? A. Yes, they are.

Q. I show you a paper which has been marked Plaintiffs' Exhibit 10 and ask you to state what the report is and in whose handwriting it is.

Mr. Rosenblum: I object to that. That is one of the same kind of reports, as your Honor can see, that was excluded yesterday.

Mr. Reeder: Your Honor I think was right in excluding those reports yesterday, because they were merely a duplication of the witness' testimony, and I assume they were excluded on that ground.

We are now trying to show that this is a permanent record of the Bureau, kept in the regular course of business. Mr. Stohlman is at home sick. We only offer it

for the purpose of showing what Mr. Stohlman's findings were as to the contents of the car that he inspected.

Mr. Rosenblum: That is objected to for many reasons. First, there is no showing he has jurisdiction of keeping these records, and there is no showing that he was qualified, or is qualified, to make any report as to the nature [fol. 132] and quality of this commodity, and there is no opportunity for cross-examination.

Mr. Reeder: I think there is an exception to the general rule, that exceptions are admissible where records are kept in the regular course of business and are—

Mr. Rosenblum: That is where it may be a party to the case. The Western Weighing Bureau and Inspection Bureau is not a party to this case. Their records are not binding on us.

The only thing these witnesses have testified to with reference to the contents of these cars is what they saw the cars contain. I objected then to the introduction of the various reports made, because there was no showing that these witnesses were qualified as experts to state their conclusions in the reports, and the reports did not prove anything. They have no probative value here.

Mr. Reeder: May I suggest this, your Honor: If your Honor will temporarily admit this proof, and allow us to examine the cases, if we can not furnish your Honor authority sustaining it, then it will be stricken out, and we will later, as soon as this man is well, bring him in and supply that evidence.

Mr. Rosenblum: I don't know just what your Honor's docket is, whether you are going to be able to proceed with this case tomorrow or not.

The Court: I have several matters specially set for to [fol. 133] morrow.

Mr. Reeder: Wouldn't that be satisfactory to you, Mr. Rosenblum?

Mr. Rosenblum: I would be satisfied to let this witness return at such time as he is well, and even to let him testify at the conclusion of defendants' case, but I certainly

object to this paper being introduced in evidence as evidence of what was in that car.

Mr. Reeder: I think it is admissible, but I may be mistaken about it. It is a close question.

The Court: I don't believe it is.

Mr. Reeder: If we can not find a case directly in point sustaining it, we will naturally want it stricken out, and then, unless counsel will admit—

The Court: How much longer will it take to complete this hearing?

Mr. Rosenblum: I am quite certain that the defendants' case will consume a full day.

The Court: Do you think it will run over until Monday?

Mr. Rosenblum: I don't know how many more witnesses these folks have.

The Court: I do not expect to continue tomorrow afternoon. We will stop at half-past twelve.

Mr. Rosenblum: Monday is Judge Davis' law docket.

The Court: It is law docket day here, too. It would [fol. 134] have to go over until Monday afternoon. I don't know how long our law docket will be.

Mr. Rosenblum: I have a matter before Judge Davis that must be argued.

(Here ensued private colloquy between the Court and the Clerk.)

Mr. Rosenblum: I am perfectly willing that they use this witness next week, if we go over until next week, and I am almost positive that it will take until next week.

Mr. Reeder: I am not sure how sick this witness is.

The Court: This case will continue for a day, anyhow, and we will find out later about that. The objection will be sustained.

Mr. Reeder: You may inquire.

## Cross-Examination.

By Mr. Rosenblum:

Q. Mr. Timmons, the Western Weighing and Inspection Bureau is an organization primarily for the purpose of assisting the railroads in getting more money for the traffic they haul; is that correct? A. No, sir.

Q. What is it?

A. It is an organization to take and straighten out quarrels, I would say, on the same order as a clearing house. Hear complaints on both sides; give and take. The shipper calls up and he has got a complaint; the railroads put it over to us to call on the shipper and [fol. 135] straighten it out and give the man a just and fair ruling on it, whatever party it affects.

Q. The railroads pay the Western Weighing and Inspection Bureau, that is, the sole money that they get comes from the railroads, doesn't it?

A. That I couldn't say.

Q. Who was it that first asked you to find out what was in these cars?

A. The Rock Island Railroad called the office and I happened to be in and I was told by the Chief Clerk to go out and look at them.

Q. Were you told what was in them?

A. No, sir. I was out there and I asked—I was in the office and got the car number and asked for the location of the car.

Q. You have inspected many cars, haven't you?

A. Yes, sir.

Q. Do you always take samples when you inspect them?

A. No, sir.

Q. Isn't it a rare thing for you to take a sample?

A. If at any time there is any difference, I feel it my duty to take—if there is any question that may arise at a later date, I think it is done.

Q. You take a sample. In how many instances in your practice, over a month's time, would you take a sample?

A. Well, I wouldn't say, for the simple reason that possibly, in my line of work, there are calls for me to do a [fol. 136] lot of running around with claims, and so forth.

Q. You couldn't say. You changed the classification, did you not?



Mr. Reeder: Just a moment. We want to object to that, because, as to this witness, there were no questions asked on direct examination concerning any classification. We merely asked him what was in the car and his reports were excluded. So, that matter was not gone into on direct examination.

Mr. Rosenblum: I am asking this to test the witness' credibility, your Honor.

The Court: Objection sustained.

Mr. Rosenblum: You picked out some samples, did you not? A. Yes, sir.

Q. In picking out those samples did you not try to pick out the samples that would make it appear that, whatever your report was, was a correct report?

A. No; absolutely not.

Q. And these samples, this Exhibit B, or 5, rather, you didn't pick out the best you could find in there? A. No.

Q. There were a lot better than that?

A. I picked those out at random, out of the car.

Q. Were there some better than these, a lot of them better than these?

A. That I would not say, because I did not—they were all practically in the original shape—

Q. I didn't ask you that question, did I? I asked you this: There were a lot better thread protectors in that [fol. 137] car than these that you picked out as samples?

A. That I would not say.

Q. There were a lot worse ones than you picked out?

A. I never seen any worse.

Q. None worse than what you have here?

A. No, sir.

Q. These were really the worst, then, that you could find in that car?

A. They were out of that car.

Q. Is that right; these are the worst that you could find in that car, Missouri Pacific 73665?

A. I picked them right out of the car—

Q. I know what you say, but I am asking you to answer my question. Were these the worst samples that you could find in that car, as to the condition of the thread protectors?

A. When I picked them up I didn't—I picked them out without searching for good or bad.

Q. So, you didn't look to see whether these were the best or the worst, did you? A. No, sir.

Q. In picking out samples you were not trying to make it appear, or have it appear to anyone, and least of all in this court, that this was characteristic of what was in that car?

A. The general run of the car was on those lines.

Q. Did you know you were going to testify in court when you picked out these samples and marked them?

A. I did not.

Q. You never had any idea that there would be a court proceeding? A. No.

Q. You knew they were shipped as scrap iron, did you not?

A. I knew what the way-bill said, after I seen it.

[fol. 138] Q. You knew that they were shipped as scrap iron, did you not?

A. Not until I [see] the way-bill.

Q. When you saw it you knew it? A. Yes, sir.

Q. You knew that you were going to try to have them shipped at a higher rate, or classified at a higher rate?

A. Yes, sir.

Q. You knew if you brought in thread protectors that did not have rust and were not pitted, you had a better chance of establishing a higher rate, did you not?

A. There were none in that car that were pitted or rusted.

Q. Not a single one rusted? A. Not that I seen.

Q. Take a look at this Defendants' Exhibit B and tell if you saw any that were as rusted as that one.

A. No, sir.

Q. You didn't see a single one that had any rust on the threads anywhere; is that right?

A. Not that I noticed.

Q. Tell us the truth. You were not looking for any that were rusted, were you?

A. I was looking at all of them. I kicked them around.

The Court: I did not get your answer.

The Witness: I picked them up and threw them around, to check and see what was in the car.

Mr. Rosenblum: Do you know how long they had been in this open coal car?

A. Well, from the day they were moved to the day they were loaded, I guess; the day they were billed out up to the day they unloaded them. I couldn't say offhand, without referring to the date of the way-bill, the date of the in-[fol. 139] spection.

Q. These Exhibits 5, these rings that you see there, were in this open coal car from August 6th, when they were shipped, until August 13th, when you inspected them. They were not covered in any way, were they?

A. No; they were in the open coal car.

Q. Do you have any idea of where they were before they were shipped?

Mr. Reeder: I think that is asking the witness to guess what oil field they came from, and I object to it for that reason.

Mr. Rosenblum: If he knows.

The Court: He can say, if he knows.

(To the witness) Do you know?

The Witness: No, I don't.

Mr. Rosenblum: Do you know what yard they were in, what scrap iron yard they were in?

The Court: He says he does not know. <

A. No.

Mr. Rosenblum: You haven't the slightest idea where they were before they were shipped? A. No.

The Court: That is three times that he has said no.

Mr. Rosenblum: Mr. Timmons, could you tell us as to this particular car how many of these thread protectors you looked at?

A. I would say, offhand, about fifteen to twenty; some-[fol. 140] where along that line. I would pick them up and look them over and throw them down, through picking around in the car and walking over it, and so forth.

Q. Do you know anything about the process by which these are reconditioned? A. No, sir.

Q. Do you know whether any of them had any value for their original purpose—I withdraw that question.

Do you know what their value was in the condition in which you saw them in the cars?

Mr. Reeder: We did not ask him that question on direct examination.

Mr. Rosenblum: I will make him my witness as to that.

A. What is the question?

Q. Do you know what value they had at the time you saw them in the cars?

A. You mean, in money?

Q. Yes. A. No.

Q. Do you know what commercial value they had at the time you saw them in the cars—that may be a slightly different question.

A. In what way do you mean?

Q. Commercial value. Can you tell us—

A. You mean, cash money?

Q. Yes.

A. No. I don't know anything about what they were worth in value in money, no.

Q. You did change the classification, did you not?

[fol.141] Mr. Reeder: I think your Honor passed on that question.

Mr. Rosenblum: I will ask to make him my witness as to that point.

The Court: Suppose you do make him your witness—

Mr. Rosenblum: I think I have a right to ask him, whether he was asked on direct examination, if that is the objection you are going to make.

Mr. Reeder: It is. I am trying to shorten this; I don't want to unduly lengthen it. I don't believe you can make the witness your witness at this time. You can recall him as your witness.

Mr. Rosenblum: That is within the discretion of the Court.

Mr. Reeder: That is within the discretion of the Court, but if you are going to make him your witness every few

minutes, just to ask him a question you want to ask, you will lengthen this proceeding instead of shortening it.

The Court: Yes; I think if you make him your witness probably you had better wait until you get through with the cross-examination and make him your witness in your case.

Mr. Rosenblum: I don't have a desire to do it repeatedly, but I do want to know as to this change of classification. I think it may tend to show some of the motive in this witness' mind.

The Court: You may ask him at this time.

(Last previous question read as follows:)

[fol. 142] "Q. You did change the classification, did you not?" A. Yes.

By Mr. Rosenblum:

Q. Changed it from scrap iron to iron thread protecting rings? A. Yes.

Q. What did you base that upon?

A. Upon their being in their original shape and not broken in any way.

Q. You didn't know if these could be used, did you, in the shape in which you saw them there in the car?

A. In the original—

Q. That is not the question I asked you. Did you know if they could be used on the ends of pipe in the shape in which you saw them in the car?

A. Yes, they were usable.

Q. How could you tell that?

A. Because they were not broken up and they were still in good condition.

Q. You don't know what process they have to go through, and do go through, before you can use them again, do you?

A. No; I have never been through the plant.

Q. Was there any doubt in your mind at all about it, before you changed that classification? A. No, sir.

Q. No doubt at all? A. No, sir.

Q. Did you look at the freight classification or freight tariff about it?

A. I looked at the classification?



Q. In the freight book, such as Mr. McGrane testified about here. A. No.

Q. There was not the slightest bit of doubt in your [fol. 143] mind that the classification should be changed?

A. No, sir. They were not scrap iron.

The Court: Will the witness please keep his voice up? Counsel and the Court and the reporter have to hear you. Try to keep your voice up.

The Witness: Sure.

By Mr. Rosenblum:

Q. Did you ever take one of these thread protectors that you examined and attempt to screw it on the end of a piece of pipe?

A. No, I never did. There was no pipe around available. But I did screw them into the end of another one, into another protector.

Q. There was no damage that could be done to these things by throwing them around in the car, was there?

A. No.

Q. You couldn't damage them that way? A. No.

Q. Don't some of them have threads on the outside?

A. Some of them have threads on the outside, yes.

Q. If you throw a piece of metal down, with the threads on the outside, you can't damage them?

A. I didn't pick those up. They were all—the biggest part of them were put together, all just right there, and those that I picked up were the threads on the inside.

Q. Do you know how those things are loaded into a car, or unloaded, in the condition in which this car was—are they loaded at random, or piled up?

A. They go in at random, just like they put them in. [fol. 144] Q. Just thrown in. I think that is all.

### Redirect Examination.

By Mr. Reeder:

Q. I understand you to say that the great majority of the rings in these cars that you inspected were screwed together; is that right? A. Yes, sir.

Q. I am now handing you Plaintiffs' Exhibit 4?

A. Yes.

Q. They were about in that condition? A. Yes, sir.

Mr. Reeder: That is all.

### Recross Examination.

By Mr. Rosenblum:

Q. Take a look at Defendants' Exhibit D and tell us whether you saw in any of those cars—you examined four of them, did you not? A. Yes, sir.

Q. Tell us whether in any of those cars you found a piece that could be said to be comparable or like this Exhibit D.

A. No, sir; there were none in the cars that I seen like them.

Mr. Rosenblum: That is all.

[fol. 145] E. A. THARP, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the plaintiffs, as follows:

### Direct Examination.

By Mr. Reeder:

Q. State your name, please, sir. A. E. A. Tharp.

Q. Where do you live? A. Chicago, Illinois.

Q. What is your business?

A. I am in the Freight Traffic Department of the Chicago, Rock Island and Pacific Railway.

Q. What position do you hold with them?

A. Assistant General Freight Agent.

Q. How long have you been in that department?

A. I have been in that department since March 17, 1925.

Q. With reference to tariffs and rates, what are your duties?

A. My principal duty is the handling of rate complaints before the Interstate Commerce Commission and various State regulatory bodies.

Q. How many years' experience have you had in determining correct rates or interpreting the tariff rates?

A. Well, I would say around twenty years.

Q. Have you with you the tariffs applicable to the shipment involved in these eight counts of this petition?

A. Yes.

Q. Have you examined the tariffs, Mr. Tharp, for the purpose of determining the correct classification and cor-

rect rate and correct freight charges due on each of these shipments? A. Yes.

[fol. 146] Q. Have you those tariffs with you?

A. Yes.

Q. In volume, can you describe them, please, sir, as to the volume?

A. You mean, the weight of them?

Q. I want the record to show that they are voluminous—

A. I would judge they weigh fifteen or twenty pounds.

Q. In the form of a book they would be about eighteen inches—

Mr. Rosenblum: I thought we were trying to save time.

Mr. Reeder: Instead of introducing all of these, I want the record to show that it is not practicable to do so. You can refer to any part of them—

Mr. Rosenblum: If they are concealed we can't even see them.

Mr. Reeder: We will have them.

Q. They are very voluminous, are they, Mr. Tharp?

A. Yes; I would say they were very voluminous.

Q. Take the first shipment that appears here, in Count

1—

The Court: I suppose in this case, if we had a jury, we would have to be very careful about the instructions on the weight of the evidence.

Mr. Reeder: In that event, we would introduce that, because we would have the weight with us.

Q. Count 1 of the petition is the one I have reference to now, a shipment of iron thread protecting rings from Shelby, Montana, to St. Louis, Missouri, weighing 60280 [fol. 147] pounds, shipped loose in an open car on July 20th, 1937, delivered at St. Louis to the consignee on the 29th day of July, 1937. Please state the correct tariff rate covering that commodity and that shipment.

Mr. Rosenblum: I object to that, for the reason that there is no showing that the commodity that was shipped

in that car is entitled to take that rate. There is no showing that the commodity that was contained in that car was not scrap iron, and that the full scrap iron rate was not paid and was not the adequate rate and not the correct rate.

The Court: Read the question.

(Last previous question read to the Court.)

Mr. Reeder: We have proven that the contents of the car were these iron protecting rings—thread protecting rings. We have also shown that they were shipped loose, in an open car. The question we are asking is what is the correct tariff rate?

The Court: If they are shipped as rings?

Mr. Reeder: Regardless of what they are shipped as—yes. The consignor can not determine the rate by designating the commodity. We prove what the commodity is and then we ask this witness what is the correct tariff rate covering the commodity that was found in the car and shipped between those two points.

The Court: I think your question assumes—

[fol. 148] Mr. Rosenblum: It assumes that that is what was in those cars.

Mr. Reeder: The facts are stipulated covering everything except the contents of the car, your Honor.

The Court: You are asking this witness to decide the question that is for the Court to decide, are you not? The way the question is framed, are you not submitting to this witness for determination the very question that this Court is to determine?

Mr. Reeder: No, I don't think so, your Honor. We have to prove the correct rate from these tariffs.

The Court: You can prove what the tariff would be on scrap iron and prove what it would be on these rings and thread protectors.

Mr. Reeder: All right. We will do it that way. We have not assumed anything, because all the other facts I have included in his question are stipulated.

Mr. Rosenblum: I am not raising any question about the stipulated facts.

The Court: They have never stipulated that this was not scrap iron?

Mr. Reeder: No. That question we offered proof on.

The Court: Your question assumes that it is determinative.

Mr. Reeder: Very well.

Q. Will you tell us, please, what is the correct rate, [fol. 149] tariff rate, between the points mentioned, Shelby, Montana, and St. Louis, Missouri, on thread protecting rings, iron thread protecting rings?

Mr. Rosenblum: I object to the use of the word "correct".

Mr. Reeder: What is the tariff rate? I will omit the word "correct".

A. On July 20, 1937?

Q. On July 20, 1937.

A. 97 cents per 100 pounds.

Q. 97 cents per 100 pounds?

A. Yes, sir, and in addition to that—

Mr. Rosenblum: I agreed with Mr. Reeder that it would not be necessary to have a copy of the freight rates certified by the Interstate Commerce Commission to use in evidence; however, I think that this witness should not just testify from his memory, unless he can—I don't believe he can—but he should testify as to the place in the tariff and the name of the tariff where this particular rate is found. If he has a list of it—

The Witness: We will be glad to do that.

Mr. Reeder: I will do that, if you wish it.

Mr. Rosenblum: I think that is the right way.

By Mr. Reeder:

Q. You said 97 cents. Now, when shipped loose—

A. 97 cents; from this point to St. Louis, it was 97 cents.



Q. It was 97 cents. A. Yes.

Mr. Rosenblum: Tell us where that rate is found.

[fol. 150] A. It is found in Item 2308, in what is known as Trans-Continental Freight Bureau Eastbound Freight Tariff 2-G L. E. Kipps' Tariff I. C. C. No. 1394.

By Mr. Reeder:

Q. Mr. Tharp, state whether or not on certain shipments of iron thread protecting rings there is a penalty when not shipped in boxes, but shipped loose in the car.

A. In certain instances, depending on the tariff, that is correct, yes.

Q. Please tell the Court whether or not, covering this particular shipment, in this particular territory, there is such a penalty.

A. There would be no penalty in connection with such a shipment that moved from Shelby, Montana, to St. Louis, Missouri.

Q. Assume, sir—and it has been so stipulated here—that this car contained 60280 pounds, and also assume that it contained iron thread protecting rings: At 97 cents, have you figured the freight rate, and can you tell us what it is? A. You mean, the freight charges?

Q. I mean the freight charges, correct freight charges.

A. It would be \$584.72.

Q. \$584.72? A. Yes, sir.

Q. Assuming that the defendants in this case paid upon the delivery of this car to them, the sum of \$373.74, what would be the balance now due? A. \$210.98.

Q. That is under Count 1? A. Yes.

Q. Will you tell us what the tariff rate is covering a shipment of iron thread protecting rings, not in packages, [fol. 151] but loose in the cars, from Wickett, Texas, to St. Louis, Missouri?

A. 85½ cents per 100 pounds, plus ten per cent. penalty when moved in a car loose.

Q. Can you refer the Court and counsel to that particular tariff that provides for ten per cent. penalty covering such a shipment?

A. That is provided in Rule 5, Section 7, page 4, of Consolidated Freight Classification No. 11, R. C. Fyfe's Tariff I. C. C. 24.

Q. That shipment was on July 26th, 1927, and delivered the same month: Was that the tariff that was in effect at that time?

A. The tariff that I referred to was that providing for the penalty. The tariff providing for the 85½ cents that I gave you is carried in Southwestern Lines' Tariff No. 20-N, J. R. Peel's I. C. C. 2795, in Item No. 2068-B of Supplement No. 49.

Q. Have you computed the freight charges on a shipment at that time, July 26, 1937, of iron pipe thread protecting rings, weighing 97,300 pounds? A. \$915.11.

Q. Assuming that defendants have already paid on that shipment \$321.09, can you compute for us the amount of freight charges now due?

Mr. Rosenblum: I object to that, your Honor, "now due".

Mr. Reeder: That may be objectionable.

Q. What is the difference between the two, the amount [fol. 152] paid and the amount of the original charge? In other words, put it this way: You say the freight charges were how much, on Count 2?

A. The freight charges, at the rate that I gave and on that weight, loose—

Q. Including the penalty.

A. Including the penalty, would be \$915.11. If \$321.09 had been paid, that would leave a balance of \$594.02.

Mr. Rosenblum: Would you object if I were to ask this witness just a question at this time, because it may save some confusion later on?

It is not true as to all these counts, but there is something in the tariff that provides only for packing these when they are under three inches in diameter.

Mr. Reeder: You may inquire if you wish. I have no objection.

Mr. Rosenblum: You refer, I think, to Tariff I. C. C. 2795, with reference to this penalty?

The Witness: Yes.

Mr. Rosenblum: Calling your attention to what appears on page 88 thereof, in Supplement 49, effective May 15, 1937, you notice, "Note 2" in there?

The Witness: Yes; I have read that.

Mr. Rosenblum: Would you mind reading that—have you it handy there?

The Witness: In Note 2 the item reads: "Pipe fittings and valves under three inches in diameter must be packed [fol. 153] in boxes, barrels, kegs, casks or bags, or strung on wire."

Now, we can not overlook the fact that this tariff is subject to the rules and provisions of Western Consolidated Freight Classification No. 11, R. C. Fyfe's I. C. C. 24, which provides, in Rule 5, Section 2, page 2, that, "When the commodities are described in packages as provided in connection with separate descriptions of articles, such articles will, except as specified in a separate description of articles, be accepted for transportation in any container other than trunks (whether or not constructed in accordance with the requirements of Rules 40 and 41) or in any shipping form other than 'in bulk', 'loose' or 'on skids', providing such container or form of shipment will render the transportation of the freight reasonably safe and practicable."

Mr. Rosenblum: Do you mean to say that this latter tariff that you have read does away with the provision that I had you read first?

The Witness: Any thread protector that is in excess of three inches has to be packed in accordance with the packing requirements set up in the classification.

Mr. Rosenblum: Or else it takes the penalty?

The Witness: Or else it takes the penalty.

Mr. Rosenblum: Under those circumstances, your Honor, I move that all reference to the penalty, in this count, be excluded, because there is no showing here in the evidence [fol. 154] of the size of these protecting rings that were in that car.

Mr. Reeder: Q. Explain again to the Court, with reference to the size of these rings, just when the penalty applies and when it does not.

A. In this particular instance, and having in mind this particular tariff, that if the rings were in excess of three inches, I believe, in diameter—I am not sure of that—three inches in diameter, there would be a penalty of ten per cent. If they were three inches or less in diameter they would be required to be strung on wire or placed in packages, if I remember the item correctly.

Mr. Rosenblum: The testimony doesn't show what size they were at all.

Mr. Houts: May I ask a question, your Honor?

The Court: Yes.

Mr. Houts: Mr. Tharp, let me get the result here: Do you mean that, regardless of size, there is a penalty under the tariff?

The Witness: No, I don't mean that, Mr. Houts. Under the provisions of this tariff item, "pipe fittings and valves under three inches in diameter must be packed in boxes, barrels, kegs, casks, or bags, or strung on wire." If they are not packed as indicated, there would be a ten-per cent penalty.

If they are over three inches in diameter and they are not packed in keeping with the provisions of the classification, there would still be a ten per cent penalty. So, [fol. 155] whether they are three inches or more, if they were loose, there would still be a ten per cent penalty.

Mr. Houts: In this particular case; assuming that they were in on thread protecting rings, regardless of size, if they were not packed up in bundles and were all loose, there would be a penalty, under that tariff, of ten per cent?

The Witness: That is right.

Mr. Rosenblum: There is no testimony how they were in there, except that they were in there loose, but there is no showing that they were not strung on wire or in bags—I withdraw the bags, but there is no showing that they were

not strung on wire, and here is Note 2 in this classification, which says, "pipe fittings and valves under three inches in diameter must be packed in boxes, barrels, kegs, casks or bags, or strung on wire." It doesn't say anything about those over that size, and it is the tariff on which they are basing the penalty. I say, there is no foundation on which to introduce evidence as to penalty.

Mr. Reeder: The testimony is to the effect that they were all loose. There is no testimony that any of them were packed. We asked them if they were packed. There is no testimony that any of them were strung on wire. Of course, if the shipper had wanted to take advantage of a lower tariff he could have packed them or put them on wire. Certainly, we can't assume that the ones down below were so packed.

I think the testimony meets the situation, your Honor.  
[fol. 156] The Court: Overruled.

By Mr. Reeder:

Q. The tariff that you were just speaking of, and testified about, was that in effect in July of 1937? I believe I asked that question, but I don't believe you answered it.

A. I testified from the tariff that was in effect as of July 26, 1937.

Q. Now we will go to Count 3. Please tell the Court, Mr. Tharp, the correct tariff covering a shipment of iron protecting rings—iron thread protecting rings, loose in a car, from Kilgore, Texas, to St. Louis, Missouri, on August 6, 1937, or between August 6, 1937, and August 13, 1937.

Mr. Rosenblum: The word "correct" I object to.

Mr. Reeder: Eliminate the word "correct".

Q. Give us the legal tariff rate that was in effect at that time, please, sir, on that shipment.

A. 61 cents per 100 pounds.

Q. Will you give us the freight charges on a shipment containing 56,100 pounds, between those points, at that time, including the penalty, if penalty applied under the tariff?



A. In this instance, the ten per cent. penalty would apply under the tariff.

Mr. Rosenblum: You are again assuming—

Mr. Reeder: I incorporated that in my question.

Mr. Rosenblum: May I interrupt? Is not this the same tariff as the previous one?

The Witness: Yes, it is the same tariff.

[fol. 157] By Mr. Reeder:

Q. Assuming that there were shipped loose in a car, between Kilgore, Texas, and St. Louis, Missouri, between August 6th and August 13th, 1937, iron thread protecting rings, and the weight is 56,100 pounds, please tell us the freight charges on that shipment.

A. On such a shipment the freight charges would be \$376.43.

Q. You may assume, please, sir, that the defendants paid \$168.30 on that shipment: Will you compute the balance? A. The balance would be \$208.13.

Q. Now please tell the Court the tariff rate on a shipment of iron thread protecting rings from Lamont, California, to St. Louis, Missouri, shipped on August 17, 1937, and delivered at St. Louis, Missouri, to the consignee, on August 25, 1937. A. On the same commodity?

Q. On the same commodity, iron thread protecting rings, shipped loose in the car.

A. 97 cents per 100 pounds.

Q. You may state whether or not the tariff provides for a penalty in the event the commodity is not packed, but is shipped loose in the car.

A. The tariff naming the rate from and to the points mentioned does not provide for a penalty.

Q. On a shipment of 67,220 pounds iron thread protecting rings, between Lamont, California, and St. Louis, Missouri—I am talking about this same shipment—will [fol. 158] you compute for us, please, the freight charges?

A. \$652.03.

Q. And there was paid on that shipment, on arrival in St. Louis, \$416.76—assuming that to be true, what was the balance?

A. \$235.27. Shall I give the tariff reference to that?

Q. Yes.

A. The tariff authority for the rate I mentioned is Item 2305 of Trans-Continental Freight Bureau Tariff 3-K, L. E. Kipp's, I. C. C., 1399.

The Court: Mr. Bailiff, you may announce a five-minute recess.

(At this point a brief recess was had.)

Mr. Reeder: Mr. Tharp, please tell the Court the tariff rate in effect on a shipment of iron pipe thread protecting rings, on August 12, 1937, from Lake Charles, Louisiana, to St. Louis, Missouri, and delivered on August 16, 1937.

Mr. Rosenblum: Before he does that, may I ask his authority, because there is some dispute about this.

Mr. Reeder: We will get the rate first and then the authority.

Q. Give us the rate, please, and then give the authority.

A. 81 cents per 100 pounds, plus the ten per cent. penalty. Tariff authority for the 81 cent rate is Southwestern Lines' Tariff No. 251, J. R. Peel's Tariff, I. C. C. 2881, and Southwestern Lines' Tariff 173-I, J. R. Peel's I. C. C. 2888. By cross-reference to the Consolidated Freight [fol. 159] Classification No. 11, R. C. Fyfe's Tariff I. C. C. No. 24, Rule 5, Section 7, on page 4, is the tariff authority for the penalty.

Q. And the penalty applies when?

A. The penalty applies when the commodity is shipped loose, not in packages.

Q. Assuming that these iron thread protecting rings were shipped in that particular shipment loose and the car contained 83,900 pounds, please tell the Court the freight charges under the then prevailing tariff rate.

A. \$747.55.

Q. How much was that? A. \$747.55.

Q. Assume that the consignee, the defendants in this case, paid on the delivery of this car \$218.14 freight charges, please tell the Court the balance due.

A. \$529.41.

Mr. Rosenblum: May I examine him on that count?

Mr. Reeder: Yes; if you wish you may examine him as to that count.

Mr. Rosenblum: What item in Peel's Tariff 173 do you refer to?

The Witness: Southwestern Lines' Tariff 173-I is used to determine the fifth-class rate that would apply, where a first-class rate, from and to the point here in question is 2.10.

Mr. Rosenblum: What is the 2.10? I don't understand that.

The Witness: That is the first-class rate from Lake Charles, Louisiana, to St. Louis.

[fol. 160] Mr. Rosenblum: That is the first-class rate?

The Witness: Yes. To determine the fifth-class rate, which applies on the commodity we are discussing, you have to refer to Southwestern Lines' Tariff 173, to determine what that fifth-class rate would be when the first-class rate is 2.10.

Mr. Rosenblum: What item do you refer to in that 173?

The Witness (after examining document): I'm afraid I'm going to have to correct that to 79 cents, it should be, instead of 81.

Mr. Rosenblum: Ought it not to be 69 cents?

The Witness: No; 79.

Mr. Rosenblum: Will you look at that Item 2440 and see if that is not the proper rate in that classification.

(Witness here examines document.)

Mr. Rosenblum: Mr. Tharp, what is that Item 2440, is that the proper item that controls the rate?

The Witness: I don't believe it is.

Mr. Rosenblum: Doesn't it describe it in the same way as described in all the other items?

**The Witness:** No, I don't think that item applies in this instance.

**Mr. Rosenblum:** It reads, "pipe connections, couplings and fittings, iron or steel", and then it goes on, under Note 1, "When under three inches in diameter must be packed in boxes, barrels, kegs, casks or bags or strung on [fol. 161] wire". Isn't that correct?

**The Witness:** Just a minute, please. (Examining documents)

**Mr. Reeder:** Mr. Rosenblum, we will proceed with the other two and then come back to this count.

**Mr. Rosenblum:** All right.

**The Witness:** This Count 7, if I may suggest, Mr. Reeder, is one that is similar to this Count 5, so we will take the two together.

**Mr. Rosenblum:** That is to say, you have found, as to Counts 5 and 7, that the rate that you had thought was the legal rate, you made some mistake about that?

**The Witness:** No, I don't admit that. I am willing to check what you suggest to be the right rate, to see if there is some difference or some mistake, but I don't admit at this point that there was a mistake.

**Mr. Reeder:** Suppose we take Count 6, then, and we will come back to Counts 5 and 7.

Are you prepared on Count 6, Mr. Tharp?

**A.** Yes.

**Q.** What was the prevailing tariff rate on a shipment of iron pipe thread protecting rings, loose in a car, shipped on August 23, 1937, from Odessa, Texas, to St. Louis, Missouri, and delivered at St. Louis, Missouri, to the defendants, the consignee in this case, on the 9th day of September, 1937?

**A.** 78 cents per 100 pounds, plus ten per cent. penalty. [fol. 162] **Q.** On a shipment of this commodity at that time, of 74,400 pounds, between those two points, will you tell the Court what was the freight charge under the prevailing tariff then in effect? **A.** \$638.35.

Q. And assuming that the defendants paid on that shipment, upon its delivery, \$247.50, will you tell us the balance due?

Mr. Rosenblum: I object to that "balance due".

Mr. Reeder: The balance of the freight charges.

A. \$390.85.

Q. \$390.85? A. \$390.85.

Q. Will you give us the authority for that rate, please, sir?

A. It is Item No. 2068, Southwestern Lines' Tariff No. 20-N, J. R. Peel's I. C. C. 2795.

Q. As to the penalty, it is the same as previously given with reference to other cars?

A. That is right.

Q. Will you make your further investigation concerning Counts 5 and 7?

A. Yes, if I may have some time.

Q. If you will relinquish the chair we will call Mr. Usher. He will be a very short witness.

(Witness withdrawn.)

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{fol. 163} THOMAS R. USHER, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the plaintiffs, as follows:

Direct Examination.

By Mr. Reeder:

Q. State your name, please. A. Thomas R. Usher.

Q. Where do you live?

A. 1413 Sullivan Avenue.

Q. What is your business?

A. Western Weighing and Inspection Bureau.

Q. How long were you so employed?

A. Thirty-seven years.

Q. Do you make inspections of cars for the purpose of determining the contents of the cars?

A. Yes, sir.

Q. I show you a paper that has been marked Plaintiffs' Exhibit 11, and ask you to state whether or not that is in your handwriting. A. Yes, sir.



Mr. Rosenblum: What count does that refer to?

Mr. Reeder: Count 4.

Q. Please look at that, sir, and refresh your recollection and tell the Court whether or not you made an inspection of that car. A. I did.

Q. When was the inspection made?

A. August 25th, 1937.

Q. Where was the car when you inspected it?

A. At Carrie Avenue, in the Rock Island yards, St. Louis, Missouri.

Q. That is north St. Louis, Missouri? A. Yes, sir.

[fol. 164] Q. Tell the Court what that car contained.

A. Pipe ring thread protectors, iron, loose.

Q. I show you some rings, sir, that have heretofore been marked Plaintiffs' Exhibits 4 and 5. With reference to these rings can you give the Court an idea whether or not they are the same kind, or otherwise, as the rings which were in this car that you inspected?

A. There was a large portion of them, of those kind of rings; some of them were larger sizes, but that was about the run of the rings.

Q. About the run of the rings? A. Yes, sir.

Q. You say they were loose? A. Yes, sir.

Q. Were any of them wired together?

A. None that I seen.

Q. What kind of a car was this?

A. An open car; a coal car, it is known as.

Q. You notice that these rings, Exhibits 4 and 5, are screwed together—two rings? A. Yes, sir.

Q. With reference to the rings in the car that you inspected, were they screwed together, or otherwise?

A. There was a great many of them screwed together.

Q. What was the condition of the rings in that car with reference to being damaged, broken, mashed, or otherwise?

A. They were in the original condition, that is, my inspection showed the top of the car. The rings I picked up and examined were not mashed, and the threads were not mashed. However, some of them were rusty and oily and dirty.

[fol. 165] Q. I will show you an exhibit that has been marked Defendants' Exhibit C: Did you see any rings in

this car that were in the condition that this ring is, Exhibit C!

A. No, sir.

Q. Did you see anything like that in the car?

A. No, sir.

Q. I show you Defendants' Exhibit B—I show you something that looks like a ring: Did you see anything in the car that looked like that? A. No.

Q. I show you another one, a little larger, that has been marked Defendants' Exhibit D: Were there any rings in the car that you saw that looked like that or were in that condition?

A. Not that I saw.

Mr. Reeder: You may inquire.

### Cross-Examination.

By Mr. Rosenblum:

Q. You have testified a lot of times about these thread protectors?

A. This is the second occasion.

Q. Way back in 1936 you testified about some, did you not?

A. Whenever that hearing was about the Colona.

Q. At that time, you testified the cars you inspected there contained quite a few rusty thread protectors?

A. I don't really remember if I did—this car did.

Q. This car contained quite a few? A. Yes, sir.

Q. Can you tell the Judge here whether those thread protectors that you looked at, that were rusted, could be used for the purpose that they were intended for, in their [fol. 166] then condition?

A. They appeared to me that way.

Q. The rusted ones—

A. Not with that rust on, you understand.

Q. That is the question I asked. In other words, you didn't look very closely at this one that Mr. Reeder showed you, Defendants' Exhibit B. He held it four or five feet away from you. I will bring it a little bit closer to you. Look at it a little more closely, please.

A. I will put my glasses on.

Q. Put your glasses on and look at that.

A. Yes (examining exhibit).

Q. Now that you have looked at Exhibit B a little closer, do you want to tell the Judge that you didn't see any in the car that looked like this Exhibit B?

A. Yes, sir.

Q. None that bad? A. That I seen.

Q. They were all better?

A. I didn't say they were all better. I didn't see any of that kind, with the threads rusted like that. Naturally, that would be the thing we would look at.

Q. Suppose you saw a carload like Exhibit B, would you classify them as scrap iron or iron thread—

A. A carload?

Q. Yes. A. I would classify them as scrap iron.

Q. How bad would they have to be before you would classify them as scrap iron?

A. With the threads damaged like that one there is.

[Vol. 167] Q. Whenever the threads are damaged they would be scrap iron?

A. Not necessarily. And they lost their circular shape through being mashed and dented.

Q. This has not lost its circular shape, has it? Look at it.

A. I still say if I was to run through an entire carload of that kind I wouldn't—

Q. You would bill them as scrap iron? A. Yes, sir.

Q. Call them scrap iron? A. Yes, sir.

Q. Suppose you got a carload that has got a percentage of protectors in like Exhibit B—

A. Like that one (indicating)?

Q. Like in my hand. How much percentage of these things would you have to find in the car before you would call the car scrap iron?

Mr. Reeder: That is objected to. We did not ask him any questions like that on direct examination.

The Court: It is cross-examination.

Mr. Reeder: The law under which we are claiming, your Honor, requires the application of a tariff that is applicable to the highest class in the car. In other words, if there is a car partly loaded with new rings and partly loaded with scrap iron, under the tariff and under the law

the rate applicable to the highest rated article in the car applies.

The Court: He may answer.

[fol. 168] A. What was the question, please?

(Last previous question read to the witness.)

A. There is no set rule. If I find enough good ones in there from what I can see from going over the top of that car and going down, I would call it pipe rings, but if I find a few, a half dozen or so, of those things in there, like scrap iron, I wouldn't bother it, although we could separate it and charge the l.c.l. rate on the good stuff.

By Mr. Rosenblum:

Q. If you find, like Exhibit 5—if you find a few of them to be in good condition; ready to be used, then you would call the car scrap iron if the rest of it was like Exhibit B?

A. If I just found a few of them in a carload of scrap iron I certainly would not raise the whole car to pipe protecting rings.

Q. From your experience, these rings are shipped in cars as scrap every day?

A. I never saw them.

Q. Did you never see them shipped as ordinary scrap?

A. I can't answer—I have seen plenty of cars of ordinary scrap iron.

Q. Have you not seen them in ordinary scrap yards?

A. Pardon me; I have seen some; however, they were in a car in a scrap yard in East St. Louis. I believe they were consigned to you folks.

Q. They were mixed with other scrap iron?

A. No; it was a straight carload, as far as I could see.

[fol. 169] Q. There was a straight carload of them?

A. As far as I could see.

Q. Whenever you find a carload of these protectors in the condition that you have told us you found these cars, if that car is consigned to a mill to be remelted, they call it scrap?

A. No; the purpose has no bearing on it at all, as far as I would be concerned, or the inspector. All we do is to endeavor to place—or get the right commodity, that is what I am trying to do. If it was going to a mill naturally they would—maybe I am talking more than I should.

Q. Go right on.

A. If it was going to a mill and going to be used entirely for remelting purposes, no doubt that could be proved and they would probably get the scrap iron rate. However, it would not be under my jurisdiction to say it was one thing one place and one thing going to another.

Q. That is not the right way to determine it. The right way to determine it is what value it has, whether it has value for remelting purposes—

The Court: Why do you take up time by asking him what is the right way?

Mr. Rosenblum: I will withdraw the question.

Q. In your view of it, would you say that the car contained scrap iron or thread protectors depending upon the condition in which you found these thread protectors?

A. Yes, to a great extent on the condition. I will [fol. 170] qualify that by saying those things, like that one you showed me there, real rusty, and if the threads were mashed, and the exterior mashed and dented, if it was a whole car, if I could see it was, I wouldn't call that thread protectors. I would not change the description.

Q. You would not make them take the highest rate?

A. No, sir.

Q. But suppose the facts were, Mr. Usher, that every single one in that particular car that you looked at couldn't be used in the condition in which it was there, it had no further use as a thread protector, and couldn't be used unless it were completely reconditioned; what would you call it?

A. I would still say thread protector.

Q. And you would make it take the same rate then as if it were a brand new car of thread protectors?

A. There is no difference. I have nothing to do with the rates.

Q. You would describe it the same as if it were a brand new car? A. Yes, sir.

Q. And as if that new car of thread protectors were in a closed car and shipped in packages—you would give it the same classification?

A. There is no difference between an open and closed car as far as the classification or the rating is concerned.



Q. Have you seen any new ones come in, a carload of [fol. 171] brand new ones; have you seen that?

A. No, sir.

Q. Have you ever seen a carload of these thread protectors after being reconditioned by the Valley Steel Company? A. Not a carload, but some of them.

Q. You have seen them packed in packages or boxes?

A. Yes, in packages, at the plant.

Q. Shipped in a closed car?

A. That I don't know.

Q. You say that as to those reconditioned thread protectors, they are the same article as you saw, loosely packed in the car, some of them rusted—you say that that is the same commodity as the reconditioned protector was, that was in a package, after it went through the plant of the Valley Steel? A. Yes.

Q. The same identical commodity?

A. Identical, but reconditioned.

Mr. Rosenblum: That is all.

Mr. Reeder: That is all.

[fol. 172] E. A. THARP, Recalled, having been heretofore duly sworn, testified further in behalf of plaintiffs, as follows:

Direct Examination. (Resumed)

By Mr. Reeder:

Q. We are now talking about Count 5, Mr. Tharp.

A. Yes.

Q. Covering a shipment of iron thread protecting rings from Lake Charles, Louisiana, to St. Louis, Missouri, shipped August 12th, 1937: What was the tariff rate on a shipment of that commodity, between those points?

A. 81 cents per 100 pounds, plus a ten per cent. penalty.

Q. Ten per cent. penalty if shipped loose in that car?

A. Shipped loose, right.

Q. On a shipment containing 83,900 pounds, which that shipment contained, please tell us the freight charges covering that shipment. A. \$747.55.

Q. And if the consignee, the defendants in this case, paid \$218.14 on the delivery of the car to them, will you tell us what the balance is? A. \$529.41.

Q. Will you please state to the Court the tariff authority for this rate?

A. Southwestern Lines' Tariff 251, J. R. Peel's I. C. C. 2881 and Southwestern Lines' Tariff 173-I, J. R. Peel's Tariff 2888, the classification that I previously made reference to as to the penalty charge of 10 per cent.

Q. That would be the same as previously referred to in [fol. 173] connection with the other cars? A. Right.

Q. Had we finished Count 6?

A. Count 7 is next. We covered Count 6.

Mr. Reeder: All right. Take Count 7. Please tell the Court, Mr. Tharp, the tariff rate in effect on a shipment of iron thread protecting rings from Rodessa, Louisiana, to St. Louis, Missouri, on June 2, 1937.

A. 69 cents 100 pounds, plus ten per cent. penalty when shipped loose.

Q. The car contained 56,100 pounds—

(To the Court) It has been stipulated that these weights are correct, your Honor.

Q. Tell the Court the freight charges on that shipment of 56,100 pounds. A. \$425.80.

Q. \$425.80? A. Yes.

Q. That includes the penalty, does it?

A. That includes the penalty, yes.

Q. The defendants paid \$330.99—

(To the Court) That is agreed to, also, your Honor.

Q. The defendants paid \$330.99. Will you tell the Court the balance of the freight charges? A. \$94.81.

Q. \$94.81? A. Yes.

Q. You were requested, were you not, Mr. Tharp, to also compute the tariff rate and tell the Court the freight charges under Count 8, a car shipped on August 28, 1937, [fol. 174] containing 58,300 pounds of iron thread protecting rings from Beaumont, Texas, to St. Louis, Missouri?

Mr. Rosenblum: That is objected to. They dismissed their petition as to Count 8.

Mr. Reeder: That is correct. We want to show the Court why we dismissed it.

Mr. Rosenblum: I object to that, what their motive was.

Mr. Reeder: I don't think the dismissal has gone into effect yet, because we haven't filed the memorandum with the Court.

Mr. Rosenblum: I think that is ridiculous.

Mr. Reeder: We want to show we found we were in error there and the freight charges were correct as collected. For that reason we are dismissing Count 8.

The Court: Objection sustained.

The Witness: Do you want the authority, Mr. Reeder, for Count 7?

(Here ensued private colloquy between Mr. Rosenblum and Mr. Reeder.)

Mr. Reeder: Yes, give that, please, sir.

A. On shipments moving from Rodessa, Louisiana, to St. Louis, Missouri, the applicable tariff rate on pipe thread protecting rings, shipped loose, would be Southwestern Lines' Tariff 251, J. B. Peel's I. C. C. 2881 and [fol. 175] Southwestern Lines' Tariff 173-I, I. C. C. 2888, and for the penalty charge the Consolidated Freight Classification No. 11, R. C. Fyfe's I. C. C. 24.

Mr. Reeder: Have you any objection to Mr. Houts asking him some questions?

Mr. Rosenblum: No.

#### Direct Examination.

By Mr. Houts:

Q. Mr. Tharp, you testified about the tariffs on seven different situations: I wish you would please tell the Court whether all of those tariffs that you have testified about had a provision in respect to the rate which would be applied when part of the shipment was of one commodity and part of another.

Mr. Rosenblum: I object to that, for the reason that there is no showing that part of the shipment was one commodity and part another.

Mr. Houts: Our position on that is that we have not been able to show that every piece of metal in this car was

of a particularly variety, and there is a tariff provision, that I want to show, which provides that the rate applicable to the highest class of article in the car, under the mixed carload rule, applies to the entire car.

The Court: Read the question.

(Last previous question read to the Court.)

Mr. Rosenblum: That is objected to. There was no evidence to show that as to any of these cars.

The Court: Overruled. He may answer.

[fol. 176]. Mr. Houts: What is your answer? I asked if there is such a provision.

A. Yes, there is such a provision.

Q. Will you please read it?

A. "Except as otherwise provided, when a number of different articles, for which ratings or rates are provided when in straight carloads, are shipped at one time by one consignor to one consignee and destination, in a mixed carload, they will be charged at the straight carload rate (not mixed carload rate) applicable to the highest classed or rated article contained in such mixed carload and the carload minimum weight will be the highest provided for any article in the carload."

Q. Now give the tariff reference to that.

A. The tariff reference for that is Rule 10, Consolidated Freight Classification No. 11, R. C. Fyfe's Tariff I. C. C. No. 24.

Q. Mr. Tharp, does that rule apply to shipments which contain iron thread protecting rings?

Mr. Rosenblum: If your Honor please, that obviously doesn't apply, because it says, as I recall it—I am saying this from memory—if there are different commodities—

Mr. Houts: The car, with at least part of the car containing iron thread protecting rings—

Mr. Rosenblum: That is objected to.

The Court: Overruled.

A. It would apply.

Mr. Houts: What is the tariff authority for that?

A. That would be the same Rule 10 of Consolidated Freight Classification No. 11, R. C. Fyfe's Tariff I. C. C. [fol. 177] No. 24.

Q. Mr. Tharp, do these same tariffs that you have talked about with respect to these seven shipments have any provision defining what scrap iron is, for the purpose of the scrap iron rate?

Mr. Rosenblum: Will you read the question, please?

(Last previous question read to Mr. Rosenblum.)

Mr. Houts: Let me withdraw that question and re-frame it.

Q. Mr. Tharp, do the tariffs applicable to the shipments between points of origin and destination, which we have mentioned in these five or seven different counts of the petition, have any provision defining what scrap iron is, for the purpose of a scrap iron rate?

A. Well, the tariffs provide that the scrap iron rates will apply on a commodity billed as scrap iron, having value for remelting purposes only.

Q. That is the language of the tariff? A. Yes.

Q. What is that tariff reference?

A. Well, one is Consolidated Freight Classification No. 11, Item 27, page 216; another is Southwestern Lines' Freight Tariff 173-I, J. R. Peel's I. C. C. No. 2888, Item 2620.

Now, all of these tariffs that I have referred to do not contain rates on scrap iron, Mr. Houts, so, so far as rates on scrap iron from some of these points, they would be carried in other tariffs than those to which I have referred.

Q. Do all the tariffs that have rates on scrap iron have the provision that you have mentioned?  
[fol. 178] A. As a general thing, they do.

Mr. Rosenblum: I object to that, as a general thing, your Honor, and move to strike that out because, as a matter of fact, one of these doesn't have that definition in.

The Court: Sustained.

Mr. Houts: Do all the tariffs applying to shipments between points of origin and destination which we have



discussed here, which have rates for scrap iron, have the provision you have stated? Do you understand that question?

A. I think I do.

The Court: Read the question.

(Last previous question read to the witness.)

A. Let me see if this answers the question: Those tariffs I have referred to, where they contain scrap iron rates, they contain this same provision as we have previously talked about.

Mr. Houts: You are talking about the time of these various shipments we have been talking about? A. Yes.

Q. The scrap iron rate, where there is a scrap iron rate, is a lower rate than the rates on iron thread protecting rings that we have been talking about, is it not?

A. Yes, sir.

Mr. Houts: You may inquire.

#### Cross Examination.

By Mr. Rosenblum:

Q. Mr. Tharp, you had some difficulty before with Count 5 and Count 7, did you not?

A. No, I didn't have any difficulty. It just took me a [fol. 179] couple of minutes to get the wording of the item in my mind.

The Court: There is no chance of getting through with this case tomorrow morning, is there?

Mr. Rosenblum: I don't believe so. I am reasonably certain that there is not.

Q. With reference to Count No. 5, calling your attention to Peel's I. C. C. 2888 and 173-I, that you mentioned in your testimony, I call your attention to an item that appears under Item 2440, which is under Section 2, page 114, reading as follows:

"Pipe connections, couplings and fittings, iron or steel, other than cast iron or steel, not plated, or steel body, not plated (See Note 1)."

Note 1 reads: "When under three inches in diameter connections, couplings and fittings must be packed in boxes, barrels, kegs, casks or bags, or strung on wire."

Is that the tariff that applies to this shipment?

A. No, that is not the tariff that applies to this shipment, for this reason: That this item applies only to a mixed carload of pipe fittings with other iron and steel articles where the pipe fittings do not exceed  $33\frac{1}{3}$  per cent. of the total weight of the carload.

Q. Where does it say that?

A. It says that in mixed carloads with articles named in Item 2400 or with articles described in 2450, provided [fol. 180] that the combined weight of the pipe and/or pipe connections, couplings and fittings, does not exceed  $33\frac{1}{3}$  per cent. of the entire weight of the shipment, minimum weight. 40,000 pounds.

The Court: That is the rate that is applicable in this case?

The Witness: No, it would be applicable, your Honor, on a car of pipe fittings—on a mixed carload of fittings, with other iron and steel articles, like bars, sheets and plates, provided the fittings did not exceed  $33\frac{1}{3}$  per cent. of the weight of the car.

Mr. Rosenblum: You don't know whether there were any other things in those cars or not, do you?

A. I didn't inspect the cars. I merely am talking about what the rates would be on a mixed carload or a straight carload, as the case might be.

Q. You have had a lot of experience, haven't you, in freight classification? Just what has been your experience; tell us a little more definitely.

A. Well, I started to work in 1917 as a messenger boy, calling train crews and engine crews. From there I went into the yard office and was car clerk and yard clerk. Then I went from there to the local office and was claim clerk and car clerk and bill clerk and rate clerk, and what was known as O. S. & D. clerk. From then I worked for different commercial organizations for a period of about three years, the Standard Oil Company of Indiana and [fol. 181] Southwestern Coal Company—

Q. Doing what for them? A. Traffic work.

Q. Would that have to do with billing and classification of freight, and so forth? A. Yes.

Q. Go ahead.

A. Then, in 1925, I went to work in the Traffic Department of the Rock Island Railroad and since that time I have been devoting all of my time to the question of rates and tariffs as they apply to freight traffic.

Q. Can you tell us what this penalty is for?

A. What the penalty is for?

Q. The purpose of the penalty.

A. The purpose of a penalty is to provide some incentive for a shipper to load the commodities that he ships in the proper fashion.

Q. So that the railroads can not be charged with damage claims?

A. No, not necessarily. We have rates on commodities that require certain packing requirements, and the rate under one packing requirement would be one thing and under a different packing requirement it would be something else. Obviously, if the commodities are not properly packed it might result in damage, as it were, and would be more difficult to handle over the freight platforms, and things of that kind.

The Court: Do you think you should take this up with this witness?

Mr. Rosenblum: I think it will lead to something that you will find worthwhile. I know the hour is getting late.

The Court: We run until five o'clock every day here.

[fol. 182] Mr. Rosenblum: I would not presume on your Honor's time unless I thought this would throw some light on the subject.

Q. These rates that you have given us on pipe protecting rings are the same rates that apply to new pipe protecting rings, are they not, when they come from the manufacturer of them? A. That is right.

Q. Who is the manufacturer of these new pipe protecting rings? A. I don't have the slightest idea.

Q. The ten per cent. penalty is put on there, as you think, so that they shall be packed in packages, and so

that there will be no opportunity, or lessened opportunity, of damage, in other words?

A. That would be one of the things. There might be other reasons.

Q. Would it be reasonable, in your opinion, to apply a penalty to this sort of shipment of thread protectors after they had been used and discarded, and many of which were rusted and in bad shape? A. I think so.

Q. When they are shipped in open coal cars and when the new protectors are shipped in closed cars, in packages?

Mr. Houts: I think we are getting into a question which is a question of law. We are not trying a rate question.

Mr. Rosenblum: I think I can show your Honor a case—it is one that I cited in our trial memorandum.

(At this point, Mr. Rosenblum and Mr. Reeder read [fol. 183] authorities in support of their respective contentions.)

Mr. Reeder: I will leave this memorandum with your Honor.

The Court: Mr. Bailiff, you may announce an adjournment until tomorrow morning at ten o'clock.

Mr. Rosenblum: May I make this suggestion? I don't believe we could finish this case tomorrow morning. I have a tremendous amount of work that has piled up over the week in my office. Would it be just as well if we could postpone it until some day next week?

The Court: I have a heavy docket all next week. I wouldn't have any day next week when I have any assurance of being able to hear it.

Mr. Reeder: We have a witness here from Pittsburgh, who has been here two or three days, your Honor. He could certainly testify tomorrow morning.

The Court: I have cases set for trial on every day next week, I think, with the possible exception of Thursday, and we have the law docket on Monday.

Mr. Reeder: Mr. Rosenblum and myself live in St. Louis, but Mr. Houts is from Kansas City.



The Court: And there are witnesses from out of town.

Mr. Reeder: I rather hope that your Honor can go on with it in the morning.

The Court: We will take it up at ten o'clock.

At this point, an adjournment was taken to February 3, 1940, at 10:00.

[fol. 184] Met, pursuant to adjournment as above, on February 3, 1940, at ten o'clock A. M.

The Court: You may proceed.

Mr. Reeder: Your Honor, may we withdraw this witness temporarily? Mr. Stohlman, the gentleman that is sick, is here and he wants to get away as soon as he can to get back home.

The Court: All right.

ARTHUR E. STOHLMAN, of lawful age, produced, sworn and examined, testified on behalf of plaintiffs, as follows:

#### Direct Examination.

By Mr. Reeder:

(On request of Counsel for plaintiffs, the reporter marks a paper "Plaintiffs' Exhibit 12.")

Q. Where do you live? A. 4465 Chippewa.

Q. What is your business?

A. Inspection Clerk for the Western Weighing & Inspection Bureau.

Q. How long have you been so employed?

A. About twenty-four years.

Q. I show you a paper that has been marked "Plaintiffs' Exhibit 12" and ask you to look at it and state in whose handwriting is that paper? A. My handwriting.

Q. When was that made with reference to the time that you inspected this car?

Mr. Rosenblum: What count is that?

Mr. Reeder: Count 5.

[fol. 185] A. Inspection was made August 16th.



Q. State whether or not that is one of the original records of the Bureau?

✓ A. Yes, sir. This record right here is an original record.

Q. Will you look at that report covering the inspection of this car and tell us when—I believe you said August 16th? A. August 16th.

Q. 1937? A. 1937, car No. 17421 T & P.

Q. What was the date of shipment?

A. The date of the shipment, August 12th, Lake Charles, Louisiana.

Q. Point of origin? A. Lake Charles, Louisiana.

Q. Point of destination? A. Destination St. Louis.

Q. Tell the Court what commodity that car contained?

A. The car contained iron or steel pipe thread protecting rings.

Q. Did you take a sample from that car? A. I did.

Q. I show you a sample that has been marked "Plaintiffs' Exhibit 4" and ask you to state whether or not that is the sample of the ring that you removed from that particular car?

A. That is the sample of the ring that I took from the car.

Q. Did you place anything on it for the purpose of identification?

A. A tag, which is customary for our employees to do.

Q. And what memorandum did you put on the tag?

A. "A sample removed from T & P 17421 August 16, 1937."

[fol. 186] Q. State whether or not these rings were in packages, or were they loose in the car?

A. They were loose in the car.

Q. Were any of them wired together?

A. No, sir; none wired together, that I could see. Now, I made an examination of the top of the car—this was an open car—I got on the cars and walked around on top of them.

Q. Did you examine them as to the condition of the rings, too?

A. Yes, sir; I examined the threads of a few.

Q. And what with reference to the sample? How did the others that you saw in the car compare with the sample, Exhibit 4, that you removed from the car?

A. They were all in one piece—appeared to be in original shape, all that I saw.

Q. Were any of them screwed together as these rings were, male and female?

A. Yes, sir; a few of them screwed together.

Q. Did you see any rings that were broken or bent or noticeably damaged?

A. No; I didn't see any that were broken or badly bent, or bent at all in fact. Of course, they were more or less stained with a little rust.

Q. Oil and dirt?

A. And subjected to weather conditions, and so forth.

Mr. Reeder: You may inquire.

[fol. 187]

Cross-Examination.

By Mr. Rosenblum:

Q. The chief function of your employment is to examine the freight and examine into damage claims, and things of that sort? A. That is right.

Q. You really represent the railroad at all times, don't you?

A. No, sir. We do represent the railroads, yes, sir; but on the other hand, if we make an inspection of the shipment we are supposed to give it—

Q. The shipper never has an opportunity to call on [your] for inspection?

A. Yes, sir, they do. If they want an inspection we tell them to call the Railroad Company, and the Railroad then calls us.

Q. The Railroad Company is your employer all the time? A. Our salary comes from the railroads.

Q. Do you get any particular extra compensation or extra reward of any kind when you find a car in which you raise the classification? A. No, sir.

Q. Is your salary fixed? A fixed salary? A. Yes, sir.

Q. It doesn't depend on whether or not you find any basis for increasing the classification of a car? A. None.

Q. And how often out of every car that you inspect do you take a sample?

A. Well, not out of every car; but where we think there is a question of doubt, we do.

[fol. 188] Q. Do you think there was a question of doubt about this car?

A. Yes, sir; because we have a number of cars that were billed "scrap iron."

Q. Was there some doubt in your mind?

A. No doubt in my mind about that car.

Q. Who told you to take the sample?

A. No one told me to take the sample. I took it myself.

Q. Whenever there is any question of doubt, you take a sample? A. Yes, sir--use my own judgment.

Q. This Exhibit 4, in whose custody was this from the time you took it until now? A. It was in our office.

Q. In whose custody? A. The District Manager.

Q. Would you say that it had been cleaned?

A. Been cleaned? No, sir; it has just been wrapped with paper is all.

Q. It wasn't cleaned at all? A. No, sir.

Q. Take a look at the threads in these two, will you please? And try to screw one on to another, will you?

A. They wouldn't screw on because one is larger than the other.

Q. How did they happen to be together?

A. I don't know. I suppose they were set that way when thrown in the car.

Q. Do you know whether this thread protector can be used for the purpose for which it was intended, in its present condition?

[fol. 189] A. Yes, sir; I would say that it could.

Q. Do you know anything about it of your own knowledge?

A. Well, I have been around the railroad yards since I was fifteen years old and I have seen them used on the ends of pipe.

Q. These particular ones? You have seen new ones used on the ends of pipe? A. Yes, sir.

Q. Can you look at the threads and tell us whether or not that thread is in a fit condition to be screwed on the end of a pipe?

A. I would say it could be screwed on the end of a pipe, myself.

Q. Were there any damages to the thread?

A. Were there any damages to the thread? We think so.

Q. You think so? A. Yes, sir.

Q. You have never had an opportunity to see the reconditioning process through which this goes?

A. I have been down to the plant on one occasion.

Q. Did you see the process?

A. Not particularly. I have seen them working on them; yes, sir.

Q. Do you know how many different processes they go through before they are reconditioned?

A. I was told by an employe down there they go through several processes before they are put in condition.

Q. Five or six of them? A. Five or six.

Q. And you know, do you, that every single one of these thread protectors as they come into the plant have [fol. 190] to be and are put through that process?

A. No, sir; I can't say that.

Q. Do you know whether any of them go through without the reconditioning process, and are sold again?

A. No, sir; I couldn't say.

Q. —In your inspection did you find any thread protectors in that car that would resemble this Exhibit "B"?

A. No, sir. To be truthful, I didn't see any, as I recall, in that bad condition.

Q. When you say "in that bad condition," what do you refer to?

A. That is, rusty. The threads are rusty and rusty on the outside. And I would say that needed to be rethreaded before it could be used—and the threads run over and cleaned up.

Q. If you found any in the car like this, would you designate the car "scrap iron?"

A. If I found all of them in there, there would be a question of doubt in my mind.

Q. You would let it go through as scrap iron?

A. No, sir; I don't believe I would.

Q. Even if they were like this? A. Yes, sir.

Q. What would you call that?

A. I would say that was a pipe thread protecting ring.

Q. And you would say it should get the same rate as a brand new one?

A. Yes, sir. It isn't bent; it is just rusty.

Q. The threads are all gone, though?

[fol. 191] A. The threads are rusty, yes, sir. I don't know whether they are all gone or not. I am not in a position to say that.

A. And you can't tell us whether or not there might have been a substantial number just like this Exhibit B, in the car? A. No, sir; I couldn't say that.

Q. Now, were those thread protectors you saw in the car all about the same as Exhibit "4"?

A. No, sir; they ranged from that up to about 14 inches in diameter.

Q. About how deep is such a car from the top to the bottom?

A. That varies. Different railroads have different size cars. Some vary in height. This one, I would judge, was about 6 feet.

Q. Six feet from the top to the bottom? A. Yes, sir.

Q. And you walked over the top of the car?

A. On the inside on these thread protectors. They were not up to the top of the car on this particular load.

Q. How far from the top of the car, about?

A. I would say about a foot.

Q. So there was about 5 feet of these thread protectors there in the car?

A. Something like that, yes, sir; about that.

Q. What condition would these pipe protecting rings have to be in before you would call them scrap iron?

A. They would have to be broken or bent some way before I would call them scrap iron.

[fol. 192] Q. All of them?

A. Yes, sir; the majority of them, yes, sir.

The Court: Announce a brief recess. We have another matter on here. Have all these parties come in my chambers.

Whereupon, at 10:22 A. M., February 3, 1940, a brief recess was announced, after which the examination was resumed as follows:

The Court: You may proceed, gentlemen.

By Mr. Rosenblum:

Q. Have you ever examined a carload of scrap iron in which you found thread protectors?

A. Did I ever examine a carload of scrap iron?

Q. Yes, sir.



A. I don't recall; no, sir.

Q. Don't these things occur frequently in a carload of most scrap? A. I don't know.

Q. Have you ever been in an ordinary scrap iron yard?

A. I inspected many times in the Frisco yard when I was inspector.

Q. Never found any of these?

A. I don't recall seeing any there.

Q. If you found a carload of this, such as you said you took a sample of, Exhibit 4, and found that its destination was a mill like the Granite City Steel—what would you call that? Scrap iron or protecting rings?

A. It would still be protecting rings.

[fol. 193] Q. Regardless of where it goes?

A. Yes, sir.

Q. Even if you knew they were going to be melted?

A. Yes, sir; the description is still there.

Q. What do you call this? Just what do you call this?

A. Iron or steel pipe thread protecting ring, is what I call it.

Q. You call that iron or steel?

A. Yes, sir—pipe protecting rings.

Q. What are they? Iron or steel?

A. That is something I couldn't answer because I am no expert on that.

Q. Don't you know they are steel?

A. I have heard that they are steel since—that is, recently. I have heard they were made out of steel.

Q. Don't you know the only rate that applies, the rate that you reported should apply, was iron protecting rings—iron—the word "steel" isn't in the tariff at all?

A. I think the classification reads "iron or steel".

Q. Could you point that classification out to us, please?

A. It is No. 12, I think it is.

Mr. Reeder: I may suggest, Your Honor, we did not ask this witness on direct examination anything concerning this subject matter that he is being cross-examined on now. There is a witness on the stand now that is testifying concerning the tariffs. He could give the Counsel this information much better than an inspector.

[fol. 194] Mr. Rosenblum: He told us he had the classification and changed the rate according to the papers he used to refresh his recollection.

Mr. Reeder: We did not inquire about the classification. We only put the witness on and asked him concerning the commodity and its condition. The direct examination was limited to that. We thought we would try to shorten it.

Mr. Rosenblum: He said that was iron or steel, and I asked him which it was and he says he doesn't know but he has heard lately it is steel. If it is steel there is no classification covering that in the tariff.

Mr. Reeder: I ask what he thinks, his answers, be stricken out because he is not an expert on this question.

The Court: Sustained.

Mr. Rosenblum: Do you know whether it is iron or steel?

Mr. Reeder: Object to that because we did not ask the question on direct examination because it was not indicated on direct examination.

The Court: Sustained.

Mr. Rosenblum: What classification did you use in changing this thing?

Mr. Rosenblum: I will ask leave to make him my witness at this time, then, for that purpose.

The Court: All right.

[fol. 195] By Mr. Rosenblum:

Q. Is this the classification you use, Consolidated Classification No. 11?

A. That classification would govern in the absence of a tariff commodity rate.

Q. Is this the one effective December 24, 1936, on page 291?

A. I will have to get my glasses. I am getting old.

Mr. Rosenblum: That is all right. It will be all right.

A. This is the Classification, yes, sir.

Q. On page 291. Here it is (indicating).

A. That is under the caption of "Pipe Fittings, Rings, Thread Protecting, Iron, in Packages."

Q. Nothing said there about steel, is there?

A. No, sir.

Q. And if they were steel instead of iron, then you wouldn't give them that classification, would you?

A. I would have no way of knowing whether they were iron or steel. I make it read "iron or steel" to cover either one.

Q. If they were steel they wouldn't come in this classification, would they?

A. Well, that is specific there. It says "Iron Protecting Rings."

Mr. Reeder: Object to that because cross-examination and leading. This is his witness as to this question and it is argumentative. He is asking the witness questions and arguing with him about it, and it is his witness. May [fol. 196] I suggest in this connection, Your Honor, the Commission has ruled this pipe-fitting rate applies on iron or steel pipe thread protection rings.

Mr. Rosenblum: Your Honor, let's stick to one thing at a time. The Commission has not so ruled.

The Court: Objection sustained.

By Mr. Rosenblum:

Q. If this article were steel instead of iron, would you classify it under the item which you have just read?

A. Some of the tariffs read "iron or steel" from certain territory; iron or steel under the caption of pipe fittings.

The Court: I am sorry. I find it necessary to take a brief recess. Announce a brief recess.

Whereupon, at 11:15 A. M., February 3, 1940, a brief recess was announced, after which the examination was resumed as follows:

By Mr. Rosenblum:

Q. But you know now these are not iron protecting rings?

A. No, sir: I don't know whether they are iron or steel. I know they are one or the other—iron or steel.

Q. How do you know that?

A. From my general knowledge.

Q. Do you know the difference between iron and steel?

A. No, sir, I don't know. I say they are iron or steel.

(On request of Counsel for Defendant the reporter marks a metal ring, "Defendant's Exhibit E")

Q. I show you Defendant's Exhibit E and ask you isn't this an iron thread protecting ring?

A. I am no expert to tell whether iron or steel.

[fol. 197] Q. And isn't this iron protecting ring the sort of thing they used to ship fifteen years ago?

A. I don't recall seeing any of them in any cars I have inspected.

Q. And isn't this iron protecting ring the thing to which the tariff applies?

A. No, sir; I couldn't say that.

Mr. Rosenblum: I think that is all.

#### Questions by Mr. Reeder:

Q. Mr. Stohlman, is there a rule that covers this question that Counsel has been asking you about, whether it is iron or steel?

A. Rule in the classification, yes, sir.

Q. What number is that rule? A. Rule 25.

Q. Will you read it to the Court?

A. Classification No. 11.

Q. I show you Classification No. 11 and ask you to read Rule 25 that appears there.

A. On one of these only they say in effect, "At the time the shipment moved"—

Q. Are you reading Rule 25?

A. Reading Rule 25, Consolidated Freight Classification No. 11: "Unless the contrary appears, the word Iron wherever used in this classification also includes steel, and vice versa."

Mr. Reeder: That is all.

#### Questions by Mr. Rosenblum:

Q. Doesn't the contrary appear in this classification? [fol. 198] The rule that you read said, "Unless the con-

trary appears the word Iron wherever used in this classification includes also steel." Now, on page 291 I will ask you, doesn't the contrary appear? and isn't it true that every other classification of pipe fittings on page 291 recites the words "iron or steel"? And I call your specific attention to these classifications that appear under Pipe Fittings, "Wherever the words are used, "pipe fittings, iron or steel, not plated; or iron or steel body not plated iron or steel, or with iron or steel body; hangers, iron or steel; iron or steel body; supports, iron or steel; pipe fittings, iron or steel, not plated; iron or steel combined with copper, brass or bronze, not plated; iron or steel covered or lead-lined, not plated; iron or steel rubber lined, not plated; iron or steel tin lined, not plated"—on the next page "Pipe fittings, iron or steel, wood lined." And isn't it true that the classification you referred to as "rings, thread protecting, iron" is the only single place in this tariff on this page 291 where the word "iron" is used alone? Now, look at it and see.

Mr. Houts: If Your Honor please, we object to that as argumentative and not tending to prove anything.

The Court: Sustained.

Mr. Rosenblum: I will rephrase the question: On page 291 does there appear a single other instance of where the word "iron" is used alone except the place that defines "Rings, Thread Protecting, Iron, in Packages?"

[fol 199] Mr. Houts: If the Court please, we object to that because the question itself shows that the item in question says iron only, and it is entirely immaterial what other items appear in there, for the purpose of this question.

Mr. Rosenblum: It elucidates the rule which says "unless the contrary appears".

Mr. Houts: The rule on its face shows the contrary does not appear as to the one item in question. For that reason we object to the question.

The Court: Sustained.



By Mr. Rosenblum:

Q. Can you tell us what the meaning of the term is in that Rule 25, "Unless the contrary appears?"

Mr. Houts: We object to that. It is asking the witness to construe a written instrument on a question of law.

The Court: Sustained.

Mr. Rosenblum: Did you know about this Rule 25 when you made your report? A. No, sir.

Mr. Houts: Object to that as entirely immaterial.

The Court: Overruled.

A. I am familiar with the classification. I have studied the classification.

Q. That is not what I asked you. Did you know about this rule?

A. Yes, sir; I did.

Mr. Rosenblum: That is all.

[fol. 200] E. A. THARP, previously sworn, resumed the stand for further cross examination, as follows:

#### Cross-Examination Continued.

By Mr. Rosenblum:

Mr. Rosenblum: Your Honor: At the time of adjourning last evening there was an argument proceeding before Your Honor concerning the question that I asked, and I would like to have the opportunity of briefly stating our position about that at this time, especially in line with the fact Mr. Reeder made certain statements here to which we very strenuously objected.

In this case, as I see it from the law and authorities that I have handed you, if the tariffs involved—and there have been two mentioned, a scrap-iron tariff and a pipe-fitting rate—are such tariffs that Your Honor can interpret in the ordinary meaning of the words, then Your Honor has the right and duty to decide this case. The cases say, however, that if the tariff involves words which are used in a particular sense so that an ordinary person not a freight expert—even though he be a Judge, not a freight

expert—cannot tell the meaning of those words, then that is a matter which the Commission must determine. Now the Ry-Krisp case and the Oak Tie case were the only cases that decided that. They have gone all the way up to the Supreme Court. They hold, for example, in the case of the Oak Tie case, that oak ties were not lumber as used in the classification, but that was something that did not require an expert body, such as a Commission is, to determine what the tariff meant, but they are words used in the ordinary meaning as ordinarily understood by business men. Now, if that language is in that shape so that Your Honor can interpret each one of the tariffs and apply or say what the meaning of the individual tariffs are, then Your Honor has the right and the duty to call this case. If it is such language which takes an expert body, then the Commission must decide what it is. Now, it is separate and apart and completely different from the question I raised before this trial, that if the rates are unreasonable the Commission must determine it and the Court has no right to. But it is purely now a question of interpretation of the tariffs; so that if you find during the course of this trial that the words are such as used in the ordinary meaning, then you have the right to call it, and you have the right to call it separate and apart from anything the Commission says. And that is true, because if we had gone before the Commission for reparation and they granted us reparation the Courts say, when we ask you for that reparation the Commission's ruling is not determinative. So here is a case where you have the duty, if you decide to take this case and carry it through and decide it, you have the duty to call it separate and apart from anything the Commission may have done. The last case on that page I handed Your Honor says, "No ruling is res judicata except it applies to the particular cars in question." And in any event, what the Commission decide with reference to other cars of material does not bind Your Honor and is not constructively binding upon Your Honor. [fol. 202] Now, the next point: And this leads directly to the question I asked this witness. If there is doubt as to which one of these tariffs apply—and I think by now there is substantial doubt as this case has developed—then that doubt should be construed in two ways. First, the cases show it should be construed in favor of the shipper and

against the carrier. Second, the cases say that that doubt should be construed along such basis as would result in not rendering an injustice to the shipper. Now, there you have the whole thing which is clearly analyzed. I think it is clearly analyzed to the Court. The rate should be construed, first, in favor of the shipper; and, second, it should not be so leveled against this shipper so as to create an injustice. And I have pointed out from my previous examination of this witness that this rate that is sought to be collected in this proceeding is the same identical rate which is sought to be collected when these thread protectors are brand new, right from the manufacturers. And even they seek in this rate to assess a penalty because they pack them loose in the cars. The commodity when it is new has three or four times the value of when they are brought into the plant, and when they are shipped out from the scrap-iron yards. The freight rate, as compared with the new rate of scrap iron, is double and sometimes treble the rate which is the scrap-iron rate, and under which these cars actually moved. So now, as I recall it, the question that I asked this witness led to that particular point, and [fol. 203] this is the question: (On request of Counsel for defendant the last two preceding questions were read, as follows:

"Q. Would it be reasonable in your opinion to apply a penalty to this sort of shipment of thread protectors after they had been used and discarded and many of which were rusted and in bad shape?"

"A. I think so.

"Q. When they were shipped in open coal cars, and when the new protectors are shipped in closed cars in packages?"

Mr. Houts: I would like to answer the argument, in view of the question. The question discloses the argument is wholly beside the point and does not support the question at all, and I think we do not need to go beyond this question at the present time. The question asked is an effort to have Your Honor pass on the question of whether the published tariff is a reasonable tariff. That is a question which is not at issue. The tariff as published is the law just as the Statute is. The Interstate Commerce Commission in the exercise of its legislative function has fixed

these tariffs. It has not only fixed them as a tariff, as we have proved by Mr. Tharp, but on a complaint it has clarified the matter, if it needed any clarification, and held as to these other classifications, points of origin and destination—some are the same and some are different—but in this opinion, which we are going to introduce in evidence, the Commission has said that scrap iron does not apply except where the steel and iron has value for remelting only. The Commission has also passed on this question in this particular tariff, in its legislative function—has said what it means about the question of second-hand. [fol. 204] This is merely an effort, now, to prove it is second-hand and to make a distinction to have Your Honor say that this law is unreasonable. That is all it is. It is not an interpretation of any terms. Of course, Your Honor can interpret this plain language. No question of interpretation involved. On that question the Commission says: "The Commission, generally, has declined to preserve lower rates on old or second-hand articles than on like articles when shipped new." Citing a decision by the Commission. As said by Division 3, "It would be difficult, without affording an easy and convenient means of misbiling and discrimination, and impractical, to establish ratings on damaged, used or second-hand articles different from those on like articles new." So the Commission by having on file these tariffs and by deciding this particular case, this particular complaint, has fixed the law, as a matter of law the tariff on iron protecting rings, new and used, and has said that the scrap iron rate does not apply unless the material, the iron and steel, has no value except for remelting. Now, there is no issue on the constructive language. The language is plain, and Counsel is merely trying to have the issue of the reasonableness of these rates determined.

Now, in the Prohibition case, Counsel conceded that reasonableness of the rates should not be passed on in a Court proceeding, and the pleading asking this trial be stayed was so that he could apply to the Commission and have the Commission pass on that. Of course, Counsel was putting the shoe on the wrong foot. The burden is [fol. 205] on the shipper to change the rate, if they want to change it. Unless and until the Commission changes



and holds the rates unreasonable and gives reparation for the past and changes it as to the future, the tariff on file has the force and effect of a Statute, and it is the duty of the carrier to sue for and to collect the rate as published. And that is a question of law, and any question about trying to try out the reasonableness of this rate is not a question open to the defendant in this case. And if it were a question open to the defendant here, the opinion of this Commission on this very issue is conclusive and an evidentiary fact. Now, we do not say it is *res judicata* because the Commission is not a court. It is evidence and calls for evidence, as far as the Commission is concerned on this thing, just like a Statute. Judge Otis was talking about the question of the Court determining the character of the articles shipped, in one case, was not a determination of the character of the articles in another case. That is all he decided.

Mr. Rosenblum: Your Honor: I think Counsel completely misapprehends the position we take. We are not at this time seeking to challenge the reasonableness of either of these rates. We say that there is a question of doubt as to which one applies. *Hornby vs. L . . . . .*, and *Davis vs. Perry*, and *Pillsbury vs. Great Northern Railroad* say that where there is no ambiguity in the language used the rate may be unjust and yet be enforced as the established rate, but in a doubtful case in the construction [fol. 206] of a tariff, in order to arrive at the intent of its framers, the Court is warranted in considering how rates claimed would operate as a matter of justice. I am not asking this witness whether the rates are reasonable; but where it would bring out as a matter of justice the application of the higher rate, it may be taken to the Court.

Mr. Reeder: We have two rates here. Either one of them applies. The only issue in this case is whether or not the rates are scrap iron or pipe fittings. We have a definition of scrap iron which is plain. The Statute states what scrap iron is. The Commission has gone further in stating, "Scrap iron is such discarded stuff that has no commercial value and is only good for remelting purposes." The Court of Appeals in the Eighth Circuit in this case quotes the opinion of the Commission. Here we have a very good definition of scrap iron. We have a definition



of the other. The only issue we can try in this case today is whether or not these rings are scrap iron within these definitions.

The Court: Objection sustained.

Mr. Rosenblum: For the purpose of the record I would like to offer to prove: I offer to prove this witness would testify that such charge by the railroad would not be reasonable and would act, as a matter of practical effect, to create an injustice to this shipper.

Mr. Houts: Object to the offer of proof. The witness will not testify to any such thing, I venture to say. You can't make a record that way.

[fol. 207] Mr. Rosenblum: I offer the proof.

The Court: Sustained.

By Mr. Rosenblum:

Q. Now, with reference to this Rule 25, can you tell us as a freight expert what the language means when it says, "Unless the contrary appears"—calling your attention specifically to these words—"The word 'iron' whenever used in this Classification includes also steel; and vice versa?" A. I can tell you what I think it means.

Q. Well, that is what I asked for.

A. Rule 25 says, in the margin on page 10 of Consolidated Freight Classification No. 11, "Iron versus Steel," and opposite that wording in the margin of that page, Rule 25 says, "Unless the contrary appears the word 'iron' wherever used in this Classification includes, also, steel; and vice versa": Now, in the description on page 291 covering rings, thread protecting, iron, in packages, there is nothing stated to the contrary as set up in Rule 25. Now, the word 'iron' appears there. There is nothing stated to the contrary. Therefore, wherever the word 'iron' appears in the description it would include also, according to Rule 25, the same article when made of steel.

Q. Then, if I get you correctly—get your idea correctly—you would have, in order to come within that exception "unless the contrary appears", you would have to say "iron and not steel?" Is that correct?

[fol. 208] A. No, sir; I wouldn't say that.

Q. How would you have to do that, so that this would refer only to iron protecting rings?

Mr. Houts: If the Court please, object to that because it is perfectly obvious, the language speaks for itself: It is a question of law to construe the language.

The Court: Sustained.

Q. Could you give us an instance out of the tariff, any place in the tariff, which would in your opinion come within the words, "Unless the contrary appears?"

Mr. Houts: Object to that as speculative and not shown to have any bearing on this case, and argumentative.

The Court: Sustained.

Q. It is true, isn't it, that every single other item within that Classification, called pipe fittings, bears the words "iron and steel" wherever the words appear? Either iron or steel?

Mr. Houts: Object to that for the same reason.

The Court: Sustained.

Mr. Rosenblum: I offer in evidence, if I may be permitted to out of turn, that page—page 291 in that Classification. And I would like to read to the Court—I will not take the time of the Court because I have already read it once. I may have leave to substitute an exact copy of that page, may I?

The Court: Very well.

[fol. 209] Mr. Rosenblum: I now also offer in evidence the Rule 25 which has been read by the witness several times, appearing on page 10 of the Consolidated Freight Classification 11.

Mr. Reeder: I think it should be in the record in order that the record may be straight, that if Counsel decides to offer evidence he may offer it during the time that he is offering his own case. I do not think it ought to be offered at this time and object to it for that reason.

Mr. Rosenblum: The Court has already permitted them, and there has been a great deal of cross-examination about it.

Mr. Reeder: It has been really read in the record during the cross-examination, but he offers it as a separate exhibit at this time.

The Court: I admitted it because there was no objection made.

Mr. Reeder: We were a little slow making it, but at this time we move to strike it out.

The Court: Sustained.

Mr. Rosenblum: I am not certain—it seems to me that in the question I asked you before, if you could give us your explanation of what the terms “unless the contrary appears” mean. I don’t know whether you finished your answer? Did you? I don’t believe you did.

Mr. Reeder: To shorten the matter, may I suggest Counsel ask another question. It would be an endless thing [fol. 210] to go back on this question. I object to any renewal of the matter.

Mr. Rosenblum: I think there was some interruption and I do not believe he had finished his explanation. That question was asked without objection.

The Court: State what it was.

Mr. Rosenblum: The question I asked, could he as an expert tell us the meaning in that Rule 25 of the words “unless the contrary appears”. Will you answer the question, please?

A. I answered that question, I believe. I told you that I thought I knew what it meant, and then I proceeded to explain what I thought it meant.

Q. Will you do it again so that we will be sure to have it?

Mr. Houts: Object to that as repetition, if Your Honor please.

Mr. Rosenblum: I think there was an interruption.

The Court: Did you answer the question?

The Witness: I feel certain that I did answer the question. I told him I thought I understood what it meant, and I proceeded to explain to him what I thought it meant.

The Court: All right; tell him again. I don't remember.

A. That is, Rule 25 on page 10 of Consolidated Freight Classification No. 11 carried in the margin of the sheet the words "Iron versus Steel", and in the body of the item the following words appear: "Unless the contrary appears, the word 'iron' wherever used in this Classification includes, also, steel; and vice versa." On page 291 [fol. 211] of the same Classification No. 11 Item 18 reads: "Rings, Thread Protecting, Iron, in Packages." Now, in connection with the word "iron" as used on page 291 there is no statement indicating that it applies only on iron and, because of that rule, makes the same rate apply on an article made of steel as one made of iron.

By Mr. Rosenblum:

Q. Now, have you given us everything in your explanation of the words "unless the contrary appears?"

A. I say the words "unless the contrary appears" apply in connection with the word "iron." There is nothing in connection with the word "iron" on page 291 which indicates to the contrary. Therefore, the iron rate would apply on the steel. In other words, the word "iron" as used on page 291 would have to be qualified to make it apply only on iron, in the face of Rule 25.

Q. In other words, if it had the word "iron" only, then that would satisfy it?

A. I think that would be a sufficient qualification to exclude the use of Rule 25.

Q. Can you tell us when that portion of Rule 25 was originally in effect?

A. That might go back to 1850 sometime. I don't know.

Q. We didn't have an Interstate Commerce Commission before 1895?

A. We had tariffs before the Interstate Commerce Commission came into operation.

Q. You can't tell us how long?

A. No, sir. It has been in there for years, but I can't tell how long.

[fol. 212] Q. Isn't it a fact, Mr. Tharp, that this particular Classification of Thread Protecting Rings, Iron, relates to actual thread protecting rings such as Exhibit E, only? A. No, sir; I don't think so.

Q. Do you know anything about the iron protecting rings?

Mr. Houts: Object to the question and move the answer be stricken because it was answered before I had time to make an objection.

The Court: Sustained.

Q. Have you ever seen any iron protecting rings such as Exhibit E?

A. I think the first time I ever saw one was here in the court-room.

Q. You are speaking of the steel protecting rings you have seen here or the iron piece I have in my hand, Exhibit E?

A. I am speaking of the articles on the table in front of the reporter.

Q. They have been identified before this one. So you couldn't tell us whether these on the table are iron or steel, could you?

A. No, sir, I could not. I don't know steel from iron.

Mr. Rosenblum: That is all.

#### Redirect Examination.

By Mr. Houts:

Q. Mr. Thorpe, I was asking you yesterday whether there was a tariff provision as to shipments from the points of origin to the points of destination involved in these seven shipments in the seven counts of this petition, defining scrap iron? Now, as I recall it, you answered [fol. 213] that insofar as the particular tariffs that you had read over had any scrap-iron rate, there was a provision. Let me ask you, is that what you recall?

A. That is as I recall it, yes, sir.

Q. Now then, Mr. Thorpe, are the tariffs—same tariffs from every point of origin to every point of destination involved in this case, at the times of shipments involved in this case, the same tariff which had an item in it of scrap iron at a scrap-iron rate?

A. That is right; yes, sir.

Q. Now, was there a provision in some tariff, current, not in force at the time of these shipments, defining scrap



iron as to every point of origin and point of destination involved here? A. Yes, sir.

Q. What was that provision?

A. Where Consolidated Freight Classification No. 11 is required to be used to determine the rate of scrap iron, the description reads, under the general heading of "Iron or Steel Scrap, Not Copper Clad—See Note 9". Note 9 reads: "Ratings apply on scrap or pieces having value for remelting purposes only."

Q. Now, let me ask you this question: That tariff provision applied to movements of scrap iron between what points?

A. It would apply so far as these counts are concerned, do you mean?

[fol. 214] Q. If there had been scrap iron—assuming that they shipped scrap iron at the time in question from the same point of origin to the same point of destination as involved in these different counts—now, which counts would that apply to?

A. It would apply on a shipment that moved from Shelby, Montana, to St. Louis; from Lamont, California, to St. Louis; from Odessa—no, sir, I will take that back. The two shipments I described, it would apply on them.

Q. Now, there—is there another kind of a tariff as to movement of scrap iron between the points of origin and destination as these other—as involved in the other counts? A. Yes, sir.

Q. And what is that provision?

A. We are talking about carload rates, now. Not anything other than carload rates.

Q. Shipment of a whole carload of scrap. Suppose you wanted to find out what that would be under the tariff, the definition of it?

A. On all of the shipments involved in this proceeding—

Q. Well now, just a moment, if you please. That would be assuming that the other shipments might have involved scrap iron. On a shipment of scrap iron from the same point of origin to the destination involved in these other counts, what provision would you have?

A. The description reads, "Iron, Scrap, Etc., as follows:

[fol. 215] Scrap Iron, Scrap Steel, Borings, Filings or Screenings (Iron or Steel), Minimum Weight 50,000 pounds, also Minimum Weight 75,000 pounds. Stop-over privileges to finish loading or partly unload do not apply in connection with the rating here named. Ratings on scrap iron or scrap steel apply only on pieces (separate or combined) of iron or steel having value for remelting purposes only."

Q. Is that same substance in both of them?

A. No substance—it is the same.

Mr. Rosenblum: Object to that. Substance is not what we are interested in. It is in the tariff that we are interested. I move it be stricken.

The Court: Sustained.

Mr. Houts: That is all.

#### Recross Examination.

By Mr. Rosenblum:

Q. Would the collection of these higher charges in your opinion amount to an unjust enrichment to the railroads?

Mr. Reeder: That is objected to.

The Court: Sustained.

Mr. Rosenblum: I offer to prove by this witness if he was permitted to answer the question his answer would be in the affirmative.

Mr. Houts: Object to the offer of proof because it is not a proper offer of proof.

The Court: Sustained.

[fol. 216] Mr. Reeder: Your Honor: We have one witness here from Pittsburgh and prevailed on him to remain over until Monday, and for that reason I would like very much to go on Monday if you can.

The Court: I have a case set on Monday, but I think it is a criminal case.

Thereupon, at 11:20 A. M., February 3, 1940, the trial of this case was adjourned until Monday, February 5, 1940, at 10 A. M.

[fol. 217] Met, pursuant to adjournment as above, on February 5, 1940, at ten o'clock A. M.

Note: Due to the fact that the law docket is set for this morning, the hearing will be postponed until two o'clock P. M.

After recess, on February 5, 1940, at two o'clock P. M. the hearing was resumed as follows:

The Court: You may proceed.

Mr. Rosenblum: I would like to ask leave, sometime during the defendants' case, or before the defendants' case is over, to re-examine two or three of these men who have testified, who were inspectors for the Western Weighing and Inspection Bureau. I want to ask each one of them one or two questions.

The Court: All right.

Mr. Reeder: They have been excused, your Honor. They are not here.

The Court: Are they from out of town?

Mr. Rosenblum: There is just one question I want to ask them.

Mr. Reeder: What question is that?

Mr. Rosenblum: Whether they knew that these exhibits that have been identified as plaintiffs' exhibit [fol. 218] samples, and so forth, were iron or steel.

Mr. Reeder: That question was asked the last inspector and he said he did not know, and we will admit that the other inspectors will so testify.

Mr. Rosenblum: That applies to Mr. Usher, Mr. Timmons and Mr. McGrane?

Mr. Reeder: Yes.

The Court: That takes care of that?

Mr. Rosenblum: Yes.

Mr. Reeder: I will call Mr. Perry.

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MERLE D. PERRY, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the plaintiffs, as follows:

Direct Examination.

By Mr. Reeder:

Q. State your name, please.

A. Merle D. Perry.

Q. Where do you live?

A. Pittsburgh, Pennsylvania.

Q. How old are you, Mr. Perry? A. Forty-two.

Q. What is your business?

A. I am Traffic Manager for the Pittsburgh Screw and Bolt Corporation.

Q. Where is that company located?

A. Pittsburgh, Pennsylvania.

Q. How long have you been so employed?

A. Twenty-two years.

Q. What is the business of the Pittsburgh Screw and Bolt Company?

[fol. 219] A. The manufacture of thread protectors, the original. Also, we are in the business of reconditioning thread protectors. We also manufacture bolts, screws and threaded rods, and rivets.

Q. What are your duties as Traffic Manager?

A. To take care of anything pertaining to traffic matters, such as transportation, rates and so forth.

Q. I show you two exhibits that have heretofore been marked Plaintiffs' Exhibits 4 and 5, and ask you to state what they are.

A. Thread protectors, second-hand thread protectors.

Q. Have they a name?

A. They are a pipe thread protector.

Q. No other name—probably Colona?

A. Colona protectors, yes.

Q. Those three rings, those three thread protectors that you have just examined—

Mr. Rosenblum—There are six of them.

Mr. Reeder: Three screwed together, six in all.

Q. Plaintiffs' Exhibit 4 and 5: By whom were they made?

A. By the Pittsburgh Screw and Bolt Corporation.

Q. You say your company makes them originally, new? A. Yes.

Q. Also buys them second-hand and reconditions them?

A. That is right.

Q. How long have you been in the reconditioning business?

A. We have been in the reconditioning business now for a little over a year.

Q. Do you know of other companies that buy second-[fol. 220] hand thread protectors and recondition them and sell them again? A. I do, sir.

Q. Tell us who they are.

A. Tri-State Pipe and Supply Company, Bellaire, Ohio, Kennedy Brothers, Allport, Pennsylvania, and I understand there is another one—

Q. Did you name any of the defendants?

A. Valley Steel Products Company also recondition them.

Q. What is the original use to which these thread protectors are put? Explain to the Court the purpose that they serve.

A. We manufacture these thread protectors and sell them to the pipe mills. After the pipe mills get them they screw them on the ends of the pipe for protection in shipment. After they are shipped to the oil fields they are taken off the pipe when they are ready to use that.

Q. Do they serve any other purpose after they have been removed from the pipe? A. No, sir.

Q. Can you tell us how many different sizes you make?

A. We make 593 different sizes.

Q. Is there a majority of a certain size or within a range?

A. There is about ten to twelve sizes at present, and has been for the last few years, I would say, that represent about 92 per cent. of the total output.

Q. Tell the Court briefly just what is this reconditioning process.

A. After these second-hand pipe thread protectors [fol. 221] come from the oil fields and arrive at the place at which they are reconditioned, they are sorted according to sizes. Then they are taken into our reconditioning plant—



Mr. Rosenblum: One minute, if your Honor please. I didn't want particularly to object to the question, but at this time I must object to it for the reason that this witness has stated that his company has been in the business of reconditioning only for the past year. There was no showing that the pipe thread protectors that came in these cars are similar to those that this Pittsburgh Screw and Bolt Company are reconditioning.

The Court: Overruled.

By Mr. Reeder:

Q. Go ahead.

A. After we sort them and put them in sizes we take them into our plant and put them through a caustic bath to take the dirt off. In between each process is a washing. From the caustic bath they go into a sulphuric tank. Then from the sulphuric tank they go into an oil process. After that, in some cases, we retrace the threads.

Q. When that has been done, what do you do with the rings so reconditioned?

A. Then we sell them back again to pipe mills.

Q. When these reconditioned rings are sold back to the pipe mills, state whether or not they are used for the original purpose.

A. They are, sir.

Q. What is the resale value, how does that compare [fol. 222] with the new rings?

Mr. Rosenblum: That is objected to as not relevant to any issue in this case.

Mr. Reeder: It throws light on the situation as to the commercial value of the reconditioned rings.

Mr. Rosenblum: That is not the test. The test is the value of the rings when shipped to this—

Mr. Reeder: I will show that. I can't do it with one question.

Mr. Rosenblum: If counsel says that is what he expects to show—

Mr. Reeder: I will go back and start from the other end and reach this point.

Q. Mr. Perry, do your duties take you into the oil fields where these rings are assembled and sold to these various companies engaged in reconditioning thread protectors? A. Yes.

Mr. Rosenblum: That is leading and suggestive and doesn't state all the facts and all the places where they are sold.

The Court: Overruled.

A. Yes.

By Mr. Reeder:

Q. You may tell the Court how extensively you have travelled in the fields where such rings are removed from pipes and resold.

A. Oh, for the past six years I travelled all over the oil [fol. 223] fields. I have seen not only the new protectors in the field, but also the second-hand situation. I have seen the cars loaded by different people who were buying them.

Q. Have you ever seen any cars loaded for the defendants in this case?

A. I have, sir.

Q. Tell the Court what was the prevailing market price of thread protecting rings during the year of 1937, second-hand thread protecting rings.

Mr. Rosenblum: I object to that as not being any test or criterion of value.

Mr. Reeder: That is the only way we can show it, your Honor, what the prevailing market price was. We will follow it up by showing what they paid for them for reconditioning purposes.

Mr. Rosenblum: That is not material. The only question here is—if it is scrap iron, does it have commercial value for remelting purposes?

Mr. Reeder: We are proving it has commercial value and by so doing we disprove it is scrap iron for remelting purposes only.

The Court: Overruled.

Mr. Rosenblum: If you will excuse me, I want to make a further objection, and that is that, during the year 1937,

is not relevant here under any theory, because these protectors moved between June and August, 1937.

Mr. Reeder: During that period, between June and August, 1937, what was the prevailing market price of [fol. 224] thread protectors sold for reconditioning purposes?

Mr. Rosenblum: May I ask the witness a question?

(To the witness). Do you know the prevailing market price?

The Witness: Yes.

Mr. Rosenblum: Is that the price that was paid, or for which these protectors could be purchased in the fields, that you are now going to testify about?

The Witness: I don't get your question.

Mr. Rosenblum: Is the market price that you are about to testify concerning, the market price that a person would pay to a scrap iron dealer?

The Witness: That he pays to any person.

Mr. Rosenblum: Any person?

The Witness: An oil company or a scrap iron dealer.

Mr. Rosenblum: That is all.

The Witness: Do you want me to answer the question, Mr. Reeder?

Mr. Reeder: Yes.

A. Twenty to fifty dollars a ton.

Q. Was your company buying them in the field at that time?

A. Not at that time, not that particular time.

Q. Can you tell the Court the prevailing market price of these rings in the oil fields at the present time?

Mr. Rosenblum: That is objected to as having no relevancy to the issues here.

[fol. 225] Mr. Reeder: I think it throws light on the situation, if your Honor please. If it is immaterial it is harmless, but it tends to prove that there is a market, has

been for years, and a continued market for these rings, of a considerable value, that we are attempting to show.

Mr. Rosenblum: If it is harmless it has no value.

The Court: He may answer.

A. Some sell for thirty-five dollars a ton and the round top and bottom seventy-five dollars a ton today.

Mr. Rosenblum: I ask that the answer be stricken out. There is no showing of any round top or bottom thread protectors in these cars.

The Court: Sustained.

By Mr. Reeder:

Q. What is a round top and round bottom?

A. Where the thread is rounded on the top and rounded on the bottom.

Q. What is the other type?

A. The V shape or pointed thread.

Q. Can you look at these exhibits and tell the Court whether they are V-shaped or the rounded shape?

A. You would have to unscrew them for me.

Mr. Reeder: We will do that. (Thereupon the rings were unscrewed.)

A. They are the V type.

Q. They are the V type? A. Yes.

Q. Which type brought the most money in the field?

A. The round top and bottom.

[fol. 226] Q. The round top and bottom?

Mr. Rosenblum: I object to that. I didn't have a chance to object before he answered. I move to strike the answer as irrelevant to any issue here.

The Court: Overruled.

Mr. Reeder: We will connect it up.

Q. You say the rounded top and rounded bottom type: That is called the No. 8 type, is it?

A. I couldn't answer that. We call it round top and bottom.

Q. You say they brought more money than the other type?

Mr. Rosenblum: I object to that. You have once stricken out his answer, if the Court please; as to the rounded top.

As a matter of fact, the round top thread protectors were not even made in 1937; at least, were not shipped.

By Mr. Reeder:

Q. Mr. Perry, state whether or not these reconditioning companies recently, or in recent years, have converted the V type into the round top and round bottom type.

A. Yes.

Q. Is that being done at this time?

Mr. Rosenblum: I object to that as having no bearing on any issue in this case.

Mr. Reeder: Here is the point, your Honor: The old type was the V type. It brought one price. The round top and bottom were the new type, which commanded a little larger resale value or purchase price value.

[fol. 227] We expect to show by this witness that they are now converting the V type into the new type, which commands a larger price and sells for a larger price.

Mr. Rosenblum: The question is what they are worth when they are shipped.

The Court: Overruled.

By Mr. Reeder:

Q. Go ahead. A. What was that question?

Q. Whether or not they are now converting the old or V type thread protector into the round top and bottom type. A. Yes.

Q. Which type brings the most money, second-hand?

Mr. Rosenblum: I object to that as having no bearing on any issue in this case.

The Court: Overruled.

A. Round top and bottom.

By Mr. Reeder:

Q. If you know, what was the reason for the reconditioning companies converting from the V type to the round top and bottom type?



A. There would be various reasons. Maybe that they couldn't get the particular size that they wanted—

Mr. Rosenblum: Now, your Honor—

A. (Continuing) —so they make round top and bottom.

Mr. Rosenblum: I ask that the answer of the witness be stricken as being a conclusion and guess on the part of the witness.

The Court: Overruled.

Mr. Reeder: During your experience in the field, Mr. [fol. 228] Perry, examining these conditions that existed in the field, will you tell the Court how these oil companies and other companies that receive this pipe with the thread protectors on it—what they do and have been doing for years with thread protectors when they are removed from the pipe that they receive?

Mr. Rosenblum: That is objected to. There is no showing that any thread protectors in these cars came from any oil companies.

The Court: Read the question.

(Last previous question read to the Court.)

Mr. Rosenblum: Is my objection sustained?

Mr. Reeder: I will ask the question this way:

Q. Mr. Perry, you say you have spent a lot of time out in the oil fields and have seen these protectors removed from pipe, collected, and reloaded and sold?

Mr. Rosenblum: I must object to that part of the question as not within the testimony of the witness.

Mr. Reeder: That is preliminary to a question that I am going to ask.

The Court: Overruled.

Mr. Reeder: Tell the Court how the thread protectors are handled by these companies when removed from the pipe.

Mr. Rosenblum: Note my same objection, of no showing that these thread protectors contained in these cars [fol. 229] came from the oil fields or—

The Court: That is overruled.

A. When the pipe is ready to be used they take the protectors off and in some cases, within twenty-four hours' time the cement crew at the oil field take these protectors to the storage house and keep them there until such time as they sell these protectors to the various second-hand people, and after they are sold to the second-hand people they are then trucked direct to the cars.

Mr. Rosenblum: I must move to strike that answer as having no probative value, not tending to prove or disprove any issue in this case, and not being in any way connected with the shipments involved in this suit.

The Court: I don't know. Objection overruled.

Mr. Reeder: Can you tell the Court about what the cost of reconditioning these thread protectors is?

Mr. Rosenblum: That is objected to, unless the thread protectors the witness is about to testify to are the same type, or the same kind in a general way, as those contained in these cars.

By Mr. Reeder:

Q. Are the thread protectors that you purchase and recondition of the same general description as these protectors here?

A. They are, because Colona protectors [is] the only ones that are bought.

Q. And those are the ones you make? A. Yes.

[fol. 230] Mr. Rosenblum: But there is no showing that the witness knows the condition of the thread protectors that were in these cars.

Mr. Reeder: I am asking him the general cost of reconditioning thread protectors.

The Court: Counsel objects because there is no showing, that the witness doesn't know the type of thread protectors in these cars.

Mr. Reeder: He said they are the same type, the Colona type; that those are the only ones bought, and the ones made by this company, with which he is familiar.

The Court: He may answer.

A. Seven to eleven dollars a ton, according to the size.

Mr. Rosenblum: May I inquire as to that particular question?

The Court: Yes.

Mr. Rosenblum: When you give that figure what do you include in that, the labor or overhead?

The Witness: Everything.

Mr. Rosenblum: Overhead?

The Witness: Certainly.

Mr. Rosenblum: And labor?

The Witness: Yes.

Mr. Rosenblum: And material?

The Witness: And material.

Mr. Reeder: You may state, if you know, whether or [fol. 231] not your company buys the same kind of protectors, from the same fields, and the same people, that the defendants here buy their protectors from.

Mr. Rosenblum: That is objected to, unless it is limited to the time when these shipments were made.

Mr. Reeder: During the summer of 1937—I will withdraw that. At this time.

Mr. Rosenblum: That is objected to as being immaterial to any issue in this case.

The Court: Overruled.

A. At this time?

By Mr. Reeder:

Q. Yes. A. Yes, sir.

Q. What percentage of the protectors, Colona thread protectors, that your company buys in the field and recon-

ditions, are lost? Give us the percentage that can not be reconditioned.

Mr. Rosenblum: I object to that as not having any relevancy to any issue in this case, what they did in this past year.

The Court: What does that show, Mr. Reeder?

Mr. Reeder: It shows that these thread protectors are brought in and are reconditioned and they only lose three per cent. In other words, 97.9 per cent. of them are reconditioned and sold. It has a bearing—

The Witness: 3.2 per cent. during the year 1939.

[fol. 232] The Court: How much?

The Witness: 3.2.

Mr. Reeder: 3.2?

A. 3.2.

Q. Will you tell the Court what condition the thread protectors must be in, in order to be reconditioned?

A. Well, as far as the rust is concerned, that doesn't mean anything, or the dirt. In fact, if some of the threads are marred they can be retraced. If all the threads were marred you couldn't do anything with them.

Q. If they are mashed up, could you recondition them?

A. No, sir, or if they are very bad out of round, you couldn't do anything with them, but some that are just a small portion out of round, we can fix those up.

Q. With reference to this percentage, you said that 3.2 per cent. of the thread protectors you get in you are unable to recondition; is that correct?

A. That is correct.

Mr. Rosenblum: I don't want to object, but the record will show that my objection should be taken to that line of questioning. I don't think it is material at all as to what they do at this time, or in 1939, or what thread protectors—

The Court: The objection may run to this line of testimony.

Mr. Reeder: That would mean you recondition 96.8, would it? A. 96.8.

[fol. 233] Mr. Rosenblum: Same objection.

By Mr. Reeder:

Q. Did you, at my request, send me a new, a second-hand and a reconditioned thread protector? A. Yes.

Q. Will you look at those and state whether or not those are the thread protectors that you addressed to me (indicating)? A. Yes.

Q. First give us the new one.

A. This is the new one, right here (indicating).

Mr. Reeder: I will ask that this be marked as Exhibit—

The Witness: I beg your pardon. Just a minute. That is the reconditioned protector.

Q. Is it?

A. Yes (producing a second protector).

Q. I show you a thread protector that has been marked Plaintiffs' Exhibit 13: Is that the new protector that you sent to me from your place of business?

A. Yes, that is the new protector.

Q. That is the new protector? A. Yes.

Q. Now we will mark this one Plaintiffs' Exhibit 14, and I show you Plaintiffs' Exhibit 14 and ask you whether or not that is a protector and if it is new or reconditioned.

A. I just answered that question—oh, this is a reconditioned protector.

Q. Exhibit 14? A. Yes.

Q. Give us the next one, and I will ask to have it [fol. 234] marked Plaintiffs' Exhibit 15.

(The protector produced by the witness was marked by the reporter as Plaintiffs' Exhibit 15.)

Q. The rusty one is the one that has not been reconditioned (indicating Plaintiffs' Exhibit 15)?

A. That is as it came from the field, unloaded from the car.

Q. Can you tell the Court how this Exhibit 15 will compare with Exhibit 14 when it is reconditioned?

A. The same thing.

Q. The same thing?

A. Yes; in other words, it can be reconditioned without any trouble.

Q. Mr. Perry, can you tell the Court whether or not there are companies that make a business of buying up



those thread protectors to be sold to companies engaged in reconditioning them?

A. I don't get that question, Mr. Reeder.

Q. The question is, do you know whether or not there are companies, or companies or persons, engaged in this business of buying up these rings, these thread protectors, for the purpose of selling them to the reconditioning people?

A. Yes.

Q. Tell the Court whether or not it is general prevailing knowledge throughout the community where these thread protectors are, that they have a resale value for reconditioning.

A. Yes, sir.

Q. From your examination of the loading of thread protectors, tell the Court whether or not care is used in loading and handling them so as to avoid undue injury to the thread protectors.

Mr. Rosenblum: That is objected to, unless it is tied up with these cars.

Mr. Reeder: I mean generally; everybody.

The Court: He may answer.

A. Yes; it is the general knowledge that everybody requests the shipper wherever possible to screw one into the other for protection of the threads in shipment.

By Mr. Reeder:

Q. Do they do that when possible, screw one into the other? A. Yes.

Q. Assuming that you have a thread protector that is rusty, can that be reconditioned?

A. Rust has no bearing on it, sir.

Q. If it is bent so as to be out of round, what would you say about that? A. There are cases—

The Court: He has already testified about that. He said that when it was not too far out of round they could use it.

Mr. Reeder: I think that is correct.

Q. If you can, and know, please tell the Court what was the prevailing price in 1937, from June to August, of scrap iron for remelting purposes only.

Mr. Rosenblum: That is objected to. There is no showing that this man is qualified to testify as to market price, [fol. 236] and if he was in some mysterious way qualified, it would not be evidence. The best evidence is an entirely different thing.

Mr. Reeder: He is a general traffic man.

The Court: Qualify him as to his knowledge of prices. I don't think you did that.

By Mr. Reeder:

Q. Have you had any experience in scrap iron?

A. I have.

Q. Over what period of years?

A. Well, for several years.

Q. Has it been your business to keep track of the prevailing market value of scrap iron at different periods?

A. It has.

Q. That comes under your duties as General Traffic Manager, does it? A. That is one of my duties.

Q. Have you refreshed your recollection and can you tell the Court what was the prevailing market price for scrap iron for remelting purposes, in 1937?

Mr. Rosenblum: I object to that as not being the proper way to prove the market price, and further, that this witness is not qualified to testify.

The Court: Overruled.

A. Twelve to seventeen dollars a gross ton.

Mr. Rosenblum: And further, that no testimony as to—well, let me make it formally:

I move that that answer be stricken out. It is not limited as to time or locality.

[fol. 237] The Court: Overruled.

By Mr. Reeder:

Q. Mr. Perry, can you tell the Court whether there are other types of thread protectors besides the one we are talking about, the Colona?

A. Yes.

Q. How many others?

A. To my knowledge, there is the Wedge, made in Cleveland. The Wheeling Machine Corporation, Wheeling, West Virginia, makes another. Then there is a type that I understand is manufactured by Spang-Chalfant, Millville, Pennsylvania.

Q. I don't know whether I asked you before: When these thread protectors are reconditioned are they used for their original purpose, as new ones?

A. I believe you asked me that and I answered yes.

The Court: Gentlemen, we will have a brief recess.

(At this point a brief recess was had.)

Mr. Reeder: Mr. Perry, will you tell the Court the general market value of the new thread protecting rings in the period of time in question here, June to August, or to September, 1937?

Mr. Rosenblum: That is objected to. There is no showing that there is a general market value.

Mr. Reeder: What was the general prevailing market value of those rings during that time, if you know? You are in that business and—

[fol. 238] Mr. Rosenblum: There is no showing—

Mr. Reeder: Was there a market value?

The Court (to the witness): Was there?

The Witness: Yes, sir.

The Court: Answer the question.

The Witness: \$150.00 to \$210.00 per ton.

Mr. Rosenblum: That is for new ones?

The Witness: Yes, sir.

Mr. Reeder: I believe you said the reconditioned thread protectors have a sale value of eighty per cent of the new ones?

A. Yes.

Mr. Rosenblum: I again object to the question and move that the answer be stricken out as not having any relevancy to any issue in this case.

Mr. Reeder: You may inquire.

Cross-Examination.

By Mr. Rosenblum:

Q. I think you said something, Mr. Perry, about the market value of scrap iron: Did you testify to something of that sort, that it had a market value of seven to eleven dollars a ton? A. No, sir.

Q. What was it?

A. I said twelve to seventeen dollars, depending on the territory, but you have records of that there so that—

Q. Did you ever buy or sell any scrap iron between the months of June and August, 1937?

[fol. 239] A. We sell scrap iron or—pardon me. We sell scrap iron all the time for our company.

Q. In your own community, in Pittsburgh?

A. Yes.

Q. Is that the only experience you have had?

A. Yes.

Q. Did you ever buy or sell scrap iron in Shelby, Montana; Beaumont, Texas; Kilgore, Texas; Lamont, California; Lake Charles, Louisiana; Odessa, Texas; or Rodessa, Louisiana, during the time I have indicated?

A. Did I sell scrap iron, is that the question?

Mr. Rosenblum: Read the question.

(Last previous question read to the witness.)

A. No, I didn't.

Q. Did your company?

A. I couldn't tell just the exact period there.

Q. To your knowledge, did your company, during that period? A. I couldn't answer yes.

Q. Or no? A. That is right.

Q. How many kinds of scrap iron are there?

A. There are different kinds of scrap iron.

Q. How many kinds, roughly?

A. There is grades 1 and 2, that I know of particularly; heavy melting, farm scrap, mill scrap.

Q. Do you know about Pioneer? A. Yes.

Q. That is a form of scrap iron? A. Yes, sir.

Q. Country scrap? A. Yes.

Q. Cast iron scrap? A. Yes.

Q. Borings and burnings?

[fol. 240] A. I couldn't answer on the high speed steel. We don't deal in it.

Q. Tool steel?

A. We don't deal in that, that I know of.

Q. Is tool steel a class of scrap?

A. I wouldn't say it was.

Q. Is high speed steel scrap; is that classed as scrap?

A. I couldn't answer that.

Q. These thread protectors that you have shown to the Court, which are Plaintiffs' Exhibits 13, 14 and 15, and especially calling your attention to Exhibit 15, you say this is a kind of thread protector you now get into your plant? A. Yes, sir.

Q. Is this a round thread or straight thread?

A. I will have to look at that closely. (After examining exhibit) It is pretty hard to tell, but I think that is a round thread. It looks like it. Let me see that.

Q. Take a look at these other two exhibits, 13 and 14.

A. It is a long time since I saw this (examining). That is a sharp point thread.

Q. No. 14 you say is what kind of thread?

A. That is a V.

Q. A V type thread? A. Yes.

Q. And what is Exhibit 13?

A. That is a sharp thread.

Q. You are sure of that? A. To my knowledge.

Q. Do you know very much about that; do you have anything to do with the production end of your plant?

A. I am in there quite often.

[fol. 241] Q. Do you have anything to do with the actual production?

A. No, sir; not the actual production, no, sir.

Q. You say you have been in the field considerably?

A. Yes, sir.

Q. I ask you to take a look at Exhibit D, and tell the Court whether in the year 1937 you saw any thread protectors like this Exhibit D in the field.

A. I have seen some like that.

Q. In the condition in which this is?



A. Let me see (examining exhibit). I have seen them like this, yes.

Q. Would you say that this Exhibit D is a fair representation of thread protectors that come out of the oil fields? A. I would not.

Q. Why not? A. Because there is various sizes.

Q. I am not talking about the size.

A. That has a relation to it, Mr. Rosenblum. You don't have many of them. You wouldn't get a carload of them in a year, that size.

Q. What size is this?

A. About ten and three-quarters, I imagine.

Q. They come in various sizes? A. Yes.

Q. Forgetting the size, but paying particular attention now to the condition in which this thread protector is with reference to rust and the round condition and the threads, would you say that that is a fair representation of the [fol. 242] thread protectors, as to condition, that were found in the scrap field and are shipped in to be reconditioned?

A. Found in scrap fields—

Q. In 1937. A. Scrap field or oil?

Q. Oil fields, from the oil fields. They all go to the scrap yards, don't they? A. No, sir.

Q. A large number of them?

A. No, I wouldn't say a large number.

Q. As a matter of fact, the larger part from those six or seven cars involved here came from the scrap iron yards; you know that? A. I don't know that they did.

Q. The evidence will show it.

A. I didn't see these particular cars. That is none of our business.

Mr. Reeder: That is merely a statement of counsel, but I don't recall any evidence of that.

The Court: The Court does not recall any such evidence as that.

Mr. Rosenblum: On the memorandum they were using to refresh the witness' recollection appeared those statements, that they came from the scrap yards. Of course, the Court didn't get to see it.

The Court: The Court did not see it.

Mr. Rosenblum: That is the fact.

The Court: Is there anything the matter with them that you can show me, except that there is rust and dirt on them?

[fol. 243] The Witness: It is possible to recondition that (indicating). I wouldn't say—

The Court: That can be reconditioned?

The Witness: Yes.

The Court: Something is wrong with the threads?

The Witness: Down here is not so bad (indicating on exhibit). This is not so good. Of course, that is one of the bad ones. That is not a fair representation.

The Court: Are they all better than those, most of them?

The Witness: The largest majority are, yes, sir.

By Mr. Rosenblum:

Q. But you didn't see them right in these cars?

A. No, sir.

Q. When you say the largest majority of them are, you mean the ones you are getting now?

A. It has been for some time.

Q. You mean, the ones you are getting now?

A. Both times. Some people sell them.

Q. You don't know what the Valley Steel do, whether they sell them? A. Yes, they sell them—

Q. From these seven cars?

A. I don't know about these seven cars, but that was the policy.

Q. You know that, do you? A. Yes, sir.

Q. You don't know there is a vast difference between thread protectors coming in in 1937 and those coming in now? A. I wouldn't say that.

[fol. 244] Q. No difference at all? A. I would say not.

Q. Don't you know that now the thread protectors are shipped in a much better condition when they are shipped into the market here in St. Louis and to you, than they were in 1937?

A. They might ship in better condition, but they were pretty fair at that time.

Q. Don't you know that you could buy thousands of tons of thread protectors in 1937, that were in this condition, as this Exhibit D is? A. No, sir; I do not.

Q. At almost any price you offered for them, in the middle of 1937? A. Absolutely not.

Q. Don't you know that in the beginning of 1937 the market was up for these thread protectors and along with a general decline in business conditions that started in 1937, including the stock market, that the value of these thread protectors went way down?

A. The stock market had nothing to do with thread protectors. It was competition.

Q. It was competition. Don't you know that your company was buying these thread protectors and shipping them as scrap, during 1937, in the summer? A. No.

Q. Are you sure of that?

A. We were buying scrap, all kinds of scrap.

Q. And including this kind of thread protectors?

A. There might have been some of these.

Q. What were you buying scrap for in 1937?

[fol. 245] A. I couldn't say. That is our company—

Q. Were you buying scrap in the southwestern fields, in the localities I mentioned to you before?

A. In the southwestern fields, yes.

Q. Were you buying any in Montana and California?

A. No, sir.

Q. You were buying scrap for shipment where, during 1937?

A. I couldn't say. I was not handling anything of the scrap.

The Court: What bearing has that on this case?

Mr. Rosenblum: On direct examination has it not been asked what they were buying and I am cross-examining him—

Mr. Reeder: The question is whether this company bought up scrap and shipped it to somebody or some company some place. It has no bearing on this case.

The Court: I can't see that it has. I am asking if you can show me what connection it has. It seems to me you

are taking up time with something that I can't see is relevant.

Mr. Rosenblum: He testified that there was a market for these scrap thread protectors, and that the market in 1937 was the same as it is now, about the same as it is now. I am asking him in order to test his knowledge of those conditions at that time.

The Court: Ask him.

(Last previous question read.)

[fol. 246] By Mr. Rosenblum:

Q. As a matter of fact, there is hardly a single carload of scrap iron that you have ever seen that doesn't contain some thread protectors, isn't that true? A. No, sir.

Q. Did you ever see any of them in a carload of scrap?

A. Yes, some, but very few, though.

Q. As far as you know, the conditions with reference to the market value of these thread protectors and the scrap market in the middle of 1937, was the same as it was in the beginning of 1937?

A. No; that varied all throughout the year.

Q. When was it high and when was it low?

A. I couldn't tell you exact dates, sir.

Q. Do you have any knowledge at all of the relative value of these thread protectors in January, 1937, and in June, July or August?

A. We have the records, but I haven't them with me.

Q. Do you have any present knowledge?

A. I don't have them with me, but I do know that they ranged from twenty to fifty dollars a ton during that year. In some cases we have sold them for sixty dollars a ton.

Q. That was the beginning of the year?

A. I couldn't say the exact time, Mr. Rosenblum.

Q. Do you have any knowledge at all of what percentage of these thread protectors were reconditioned by the defendants in this case?

A. You mean, the actual percentage?

Q. Yes.

A. I couldn't tell you the actual, though I would say [Vol. 247] there were very few of them.

Mr. Reeder: Very few of what?

The Witness: Very few of that type of protectors. He said in that condition—

Mr. Rosenblum: I am speaking of Defendants' Exhibit D.

A. Yes.

Q. Very few like that were reconditioned?

A. I say very few like that.

Q. Were any of the thread protectors that came from the fields in 1937 unfit for reconditioning?

A. Were any of them?

Q. Yes. A. I would say there were, yes.

Q. Tell us when you ever saw a pile or load of these thread protectors in a scrap iron yard in June, July or August, 1937? A. The exact dates?

Q. During the month.

A. I saw them at different times; not only in these dealers' yards—you are talking about scrap iron. I don't know whether they are scrap iron dealers, but they are dealers, and I have seen them in the oil fields. I go there maybe eight, ten or twelve times a year, and spend two, three and four weeks.

Q. During 1937 your company was not buying any of them, were they?

A. I couldn't say for sure. I don't remember. We did buy a few cars that we sent north, I think, in 1937.

Q. What were you doing in the oil fields or scrap iron yards in 1937?

A. I was looking over the thread protector situation. [fol. 248] Q. With what thing in mind?

A. With what thing in mind? I was making a natural survey. We are in the manufacturing business. We wanted to see what was happening to the thread protectors, what sizes were being used and what were not being used. I testified we make 593 sizes.

Q. Don't you know what sizes are being used by the people when you sell them?

A. Not always. We might be selling them to somebody and we might not be getting that size, Mr. Rosenblum.

Q. Is it true that you and your company, and Mr. Kennedy, for the past five or six years have been exerting every effort that you could to put these defendants out of business? A. Absolutely not.



Q. Is it true that you appeared as an intervener in the first case that was brought before the Commission, or that your company appeared as such?

A. Yes; that is our natural right.

Q. Is it true that these defendants are competitors of yours? A. Yes. We have other competitors, too.

Q. Is it true that these competitors are the only ones who recondition these thread protectors in any large volume at present? A. No, sir.

Q. Who else reconditions them?

A. The Tri-State does a lot of reconditioning. Kennedy Brothers—

Q. Don't you know that the Tri-State sold out every pound of thread protectors that they had in 1939?

A. No, sir; I do not. I heard the other day where they [fol. 249] offered one of the plate companies some protectors. That was about four weeks ago.

Q. Is it not true that you or your company instituted, or caused the railroads to institute, this suit, for the recovery of these freight charges? A. Absolutely not.

Q. Is it not true that you and your company appeared before the Interstate Commerce Commission seeking to have the rate as to pipe fittings declared to be the applicable rate for the movement of these thread protectors?

A. No, sir. We appeared as intervener to protect our interest, which we naturally have under the law.

Q. How many tons of thread protectors did your company sell in 1937? A. I couldn't answer that question.

Q. How many tons of these thread protectors did defendants sell, reconditioned, in 1937? A. I couldn't say.

Q. Is it not true that you testified, or some one of your company testified, at the hearing before the Interstate Commerce Commission, that you were satisfied to pay the higher rate for thread protectors, because you wanted to destroy the competition that existed?

A. We did not testify in that case.

Q. Nobody testified? A. Not that I recall.

Q. Is it not true that you conferred with all of the railroads and their attorneys, who have filed suits against these defendants, for the purpose of assisting them in the prosecution of these suits? A. No.

Q. How are you appearing here as a witness; have [fol. 250] you been subpoenaed?

A. Not subpoenaed. The Rock Island asked me to appear—got me out of a sick bed.

Q. Did you or your company volunteer its services to all the railroads who filed these suits?

A. No, sir; not until the Rock Island asked us.

Q. Have you any interest in the outcome of this suit?

A. No; I haven't any personal interest, no, sir.

Q. Has your company an interest in the outcome?

A. No, sir.

Q. Is it not to their interest that a higher rate be charged, so that competition may be lessened between you and—

A. Our only interest in the rate situation is that we all pay the same rate.

Q. Was it not testified by your company or by you or someone, that you are perfectly satisfied to pay this higher rate?

A. We did not testify. I think the record shows that. In fact, I don't remember any of our people testifying.

Q. It is true that your company is taking the position that you are perfectly satisfied to pay this higher rate?

A. We think it is a proper rate, yes.

Q. You are perfectly satisfied?

A. We didn't say we are satisfied. I think it is a proper rate, from my traffic experience.

Q. From your traffic experience, it is perfectly proper to have the railroads charge the same rate on materials that are worth one-tenth to one-twentieth of the value of the property new?

[fol. 251] Mr. Reeder: We will have to object to that, because it calls for the conclusion of the witness and it is argumentative. The railroads have nothing to do with fixing these rates; the railroads are compelled to charge the lawful rate fixed by the Interstate Commerce Commission.

The Court: I would like to hear the witness' opinion.

Mr. Reeder: I have no objection to it, if that is the case.

The Court: It is rather interesting to me.

Mr. Rosenblum: If your Honor is interested I don't think that my question is just—I will frame it again.

Q. You said that these thread protectors—

The Court: What I would like to hear about is what was the reason for putting the same rate on—

Mr. Rosenblum: I will frame such a question.

Q. You testified, as I recall it, that these thread protectors could be bought for twenty to fifty dollars a ton in 1937? A. That is the way the prices ranged.

Q. You testified that the price new at that time was somewhere between \$150.00 and \$200?

A. That is right.

Q. Now tell the Court why it is reasonable to collect the same freight on an item that sells for from \$150.00 to \$200.00 as it is on one that sells from \$20.00 to \$50.00.

A. In the first place—rivets, which take the same rate, practically, that this does, and sell for \$68.00 a ton, take [fol. 252] an iron rate, and this second-hand, in some instances, sells for \$132.00 a ton, and in some instances better. I can't see why there would be anything to it. Bolts sell for \$80.00 a ton and take the iron rate. It doesn't take the scrap iron rate.

Q. Let us stick to the thread protectors. In the first place, all these thread protectors are steel, are they not?

A. Originally they are iron, but made into steel.

Q. They are now steel? A. Yes.

Q. Every single thread protector made in the past five years is steel?

A. Yes; more than five years. I never heard of an iron protector.

Q. Here is one, Defendants' Exhibit E.

A. That is not a Colona protector.

Q. All your protectors are steel? A. Yes.

Q. Let us get down to the question of why these protectors, when you could buy them, as you did, in 1937, for from \$20.00 to \$50.00 a ton, would take the same rate as a new protector takes and took in the same year, when it sold for anywhere from six to ten times the price.

Mr. Houts: We want to object to that question, because the question whether there is any difference between the rate on a new protector, a reconditioned second-hand protector, or an unconditioned protector, is a

legislative question that has been settled by the tariff on file.

[fol. 253] The Court: I would like to hear the answer.

Mr. Houts: I just want to make our position clear.

A. In the first place, he says one-tenth the price. As I said a while ago, they may sell for \$132 as a second-hand, and the new item might sell for \$180 a ton. You get one-tenth the price that—

By Mr. Rosenblum:

Q. Twenty dollars is one-tenth of \$200, isn't it?

A. He sells them for \$20.00, and second-hand, after it is reconditioned?

Q. The question is this and I think you understand the question. The question is, when you bought these thread protectors—when anyone bought them, you could buy them as cheap as \$20.00 a ton. When you sold brand new thread protectors you got as much as \$200.00. You want to see the railroads get the same freight rate on the new ones as they get on the old one that is in bad condition: Why?

A. Because we get the proper value. They pay something for what we sold them. As I said a while ago, second-hand can sell for \$132.00. I have seen them sell as high as \$146.00 a ton.

Q. But you know that, as far as these defendants are concerned, after those thread protectors have been reconditioned they pay the same price, because then the value is like you say, but when they are moved in their rusty condition out of the scrap iron yards, should they pay the same price?

[fol. 254] A. That has no bearing on it. I say that is up to the Interstate Commerce Commission.

Q. It is a matter of economy and a matter of saving—

The Court: Well, I think we have gone far enough. I thought that this witness had something that might be interesting, but I think we have gone far enough with it.

Mr. Rosenblum: All right. That is all, your Honor.



### Redirect Examination.

By Mr. Reeder:

Q. You stated that you are in competition with these defendants and with other companies in reconditioning these thread protectors. When you buy the thread protectors in the field and ship them back to your plant at Pittsburgh, what rate do you pay?

A. We pay the pipe fitting rate.

Q. How are they described in the shipping papers?

A. Rings, second-hand, iron or steel, for protecting threaded ends of pipe.

Q. You said that these rings are steel; is that correct?

A. Yes, sir.

Q. Can you tell what they are originally made from?

A. Well, we make the rings out of steel pipe, but naturally you start with iron to get steel. It is a processing.

Q. Tell the Court the difference between iron and steel and how it comes about.

A. Well, it is a processing, I would say.

Q. Explain more in detail.

A. The only thing I could say, you start with pig iron and go on through the process. You may have steel and [fol. 255] you may have iron. Iron is puddled and steel goes through these furnaces.

Q. Without an analysis can you look at one of these—can an average person look at one of these protectors and say whether it was steel or iron?

A. I couldn't. The only way you can tell the difference between steel and iron, you can bore in and take the borings and have them analyzed, or you can—

Q. But they both start from pig iron? A. Yes, sir.

Mr. Reeder: That is all.

### Recross Examination.

By Mr. Rosenblum:

Q. You know, don't you, that before you can have an object shaped such as this protector is it couldn't possibly be of iron, could it; it would have to be of steel?

A. I couldn't answer that, Mr. Rosenblum.

Q. You don't know?

A. I am not that good a manufacturer.



Q. When you ship these thread protectors new do you ship them in open coal cars?

A. Sometimes open, sometimes closed, but most of ours are open.

Q. Open coal cars?

A. Yes, and —not necessarily coal cars. It can be any kind of a gondola.

Q. You never ship a new thread protector in an open coal car? A. We absolutely have.

Q. Are they not all shipped in box cars, in packages?

A. What do you mean by packages?

[fol. 256] Q. What do you mean by packages?

A. We ship them with strings on them; but we load gondolas. We even load open trucks at times.

Q. When they are shipped in from the oil fields, from the scrap iron yards, into St. Louis and Pittsburgh, they are thrown into open coal cars helter-skelter?

A. That is a thing I want to bring out. I had a case the other day where I wanted our people to ship them in box cars—

Q. What has been the practice?

A. The practice has been gondolas.

Q. They are thrown in helter-skelter like any other kind of scrap, are they not?

A. I wouldn't say like any other kind of scrap, no. Scrap is generally dumped in the car.

Q. How are these things put in?

A. They are thrown in.

Mr. Rosenblum: That is all.

Mr. Reeder: I think that is all.

The Court: What is the difference between dumping and throwing?

The Witness: They might have some sort of crane at a point and pick them up with a crane and dump them in the car, and that generally falls maybe fifteen or twenty feet.

Mr. Reeder: I desire at this time to offer in evidence the opinion of the Interstate Commerce Commission—

The Court: Does this indicate that we are getting [fol. 257] through with witnesses?

Mr. Reeder: For plaintiffs, yes.

Mr. Rosenblum: I am sorry to say that I want to recall those three car inspectors.

Mr. Reeder: I thought we had passed that point when I admitted what I did admit.

Mr. Rosenblum: There is one other thing I want to ask them.

The Court: Maybe he will admit that.

Mr. Rosenblum: I want to ask them, having reference to Plaintiffs' Exhibit 15, whether they found any thread protectors, in the cars they looked at, that were anything like Exhibit 15.

Mr. Reeder: I think it is immaterial.

Mr. Rosenblum: All their exhibits have been beautiful and pretty, like this; nice clean ones, without any rust on them at all.

Mr. Reeder: They have been handled a lot. As I remember it, each one of those witnesses said some of them were rusty. Everyone of them said so.

Mr. Rosenblum: No; one or two said—

The Court: Proceed.

Mr. Houts: May I make a suggestion? Mr. Perry testified that these are subject to be reconditioned, and they are worse looking than our exhibits, and if they are, it would not help your case any, would it?

[fol. 258] Mr. Rosenblum: Are we going to start to argue this case now?

Mr. Houts: I don't see how it would be material.

Mr. Rosenblum: It will test their credibility, I think. It would not take more than a minute or two for each one.

Mr. Reeder: It would mean bringing those witnesses here. They have been excused.

The Court: Proceed. I want to get through with this case sometime. I know there have been various recesses, but it has been necessary.

Mr. Reeder: We understand that, your Honor.

Plaintiffs offer in evidence the opinion of the Interstate Commerce Commission in the case of Crancer, et al., vs. Abilene and Southern Railway Company, 223 I.C.C. 375.

That is the opinion, a copy of which your Honor received a few days ago.

Mr. Rosenblum: That is objected to for the reason that it has absolutely no probative value in this case at all. It is not determinative of this case; it is not conclusive of this case. It is not even persuasive in this case.

The Court: It will be admitted, subject to the objection. (Which opinion is in words and figures as follows):

[fol. 259]

#### Appendix.

Lester A. Crancer and George B. Fleischman, co-partners, (doing business under firm names of Valley Steel Products Company and Mid-Valley Steel Company respectively) et al.,

No. 27,535. vs.

Abilene & Southern Railway Company, et al.

Submitted July 14, 1937. Decided August 6, 1937.

Scrap-iron rates charged on used iron or steel pipe thread-protecting rings, in carloads, from points in the Southwest to St. Louis, Mo., and East St. Louis, Ill., found inapplicable. Applicable rates not shown to have been or to be unreasonable. Complaint dismissed.

Louis Mayer, W. E. Rosenbaum, and Irl B. Rosenblum for complainants.

J. G. Blaine, A. B. Enoch, M. G. Roberts, H. H. Larimore, Geo. W. Holmes, Toll R. Ware, and H. W. Schaffer for defendants.

Charles Donley for intervener

#### Report of Commission.

Division 3, Commissioners McManamy, Porter, and Miller. Division 3:

Exceptions were filed by complainants to the examiner's proposed report, and the issues were orally argued.

Complainants, co-partners, individuals, and a corporation, alleged by complaint filed September 14, 1936, as [fol. 259a] amended, that the rates demanded on used iron or steel pipe thread-protecting rings, in carloads, from points in the Southwest to St. Louis, Mo., and East St. Louis, Ill., were and are inapplicable and unreasonable. We are asked to prescribe reasonable rates for the future and to award reparation. The Pittsburgh Screw & Bolt Corporation intervened in opposition to the relief sought. Rates will be stated in amounts per 100 pounds and will not include the authorized emergency charges, which are not assailed.

This traffic consisted of used iron or steel pipe-thread-protecting rings. The threads of pipe and pipe couplings intended for gas or oil wells or for the laying of pipe lines when shipped require protection from damage, and iron or steel rings threaded in such a manner as to fit either the outside thread of a pipe or the inside thread of a pipe coupling are used. When the pipe is used the protecting rings are thrown aside and are frequently allowed to lie exposed to the weather for considerable periods. Complainants purchase these used rings at points in the Southwest, generally from scrap dealers, and ship them, in carloads, to their plant at St. Louis where the rings are sorted and put through various reconditioning processes by which accumulations of rust and dirt are removed, the rings made cylindrical, and the threads renewed. Approximately one-half of the rings received were unfit for reconditioning and were sold by complainants as scrap iron. The reconditioned rings were sold for their original purpose. Complainants stress that none of the rings could have been used without reconditioning. However, witness appearing in behalf of intervener testified that his company purchases annually in the same general territory as do complainants about 15 or 20 carloads of these protecting rings for shipment to Allenport, Pa., for reconditioning. He stated that, by exercising due care in making these purchases, only about 5 percent of the rings received are finally rejected as unfit for reconditioning, and that more than half of them do not require any reconditioning whatever.

[fol. 259b] During the period from April 1 to November 1, 1936, inclusive, complainants received 26 carloads of

these used protecting rings, some of which were originally billed as scrap iron and charges collected on that basis. Upon others, different charges were collected at rates which do not appear of record. Defendants have rendered balance-due bills to complainants for the difference between the charges paid and those which would have accrued at the rates on pipe fittings. The alleged under-charges have not been paid.

Complainants' principal contention is that the commodity shipped was scrap iron and that the application of any higher rate than that on scrap iron is illegal. Rates on scrap iron from and within the Southwest are based on alternative scales of 15 percent of the corresponding first-class rates, minimum 50,000 pounds, and 12.5 percent of first class, minimum 75,000 pounds. These rates apply "Only on pieces (separate or combined) of iron or steel having value for remelting purposes only." The rings received by complainants were not purchased for remelting purposes and approximately half of them were not remelted but were reconditioned and sold for their original purpose. In *Wisconsin Waste & Wiper Co. vs. Chicago & N. W. Ry. Co.*, 196 I. C. C. 459, 460, Division 5 said the use to which a commodity is put is not determinative of the applicable rate, but that the use may be considered in determining the nature of the commodity.

Although a portion of each shipment had a value for remelting purposes only and would come within the tariff definition of scrap iron, rule 5 of the consolidated classification provided, subject to certain exceptions not here pertinent, that such shipments will be charged at the carload rate applicable to the highest-rated article in the carload. In respect to the applicability of the rate to be charged, therefore, the fact that the shipments contained some protecting rings valuable only for remelting purposes had no controlling effect. The shipments were subject to the [fol. 259c] rates applicable to the highest-rated article contained in the mixture.

Under the general heading "Pipe Fittings", iron thread-protecting rings, in packages, in carloads, minimum 36,000 pounds, were and are rated fifth class. From most of the Texas origins and from points in Louisiana commodity



rates applied and apply on pipe fittings, in carloads, minimum 46,000 pounds, subject to certain packing requirements maintained either in the tariff containing the rates or in the governing western classification. Complainants' shipments did not meet the packing requirements and therefore, under the provisions of the mixed-carload rule of the classification, were subject to rates 10 percent higher than when the same commodity is shipped in packages. This rule is not assailed. From El Paso, Tex.; and Hobbs, N. Mex., also shown as originating points, no commodity rates were in effect and the fifth-class rates applied. The record does not show any shipments originating in Arkansas or Oklahoma.

The following table shows, from representative points at which shipments originated to St. Louis and East St. Louis, the rates on complainants' shipments, their percentage relation to first class, and the contemporaneous rates on scrap iron. The applicable rates do not include any addition for improper packing.

From	Applicable rate	Percentage of first class	Rate, min. 50,000 pounds	Rate, min. 75,000 pounds
	cents		cents	cents
Amarillo, Tex.	170	30.8	34	28
Chilton, Tex.	161	26.8	34	28
Pampa, Tex.	167.5	30.6	33	28
El Paso, Tex.	120	40	45	37
Hobbs, N. Mex.	112	40	42	35
Jeanerette, La.	162	28.2	33	28

<sup>1</sup>Commodity rate.

<sup>2</sup>Fifth-class rate.

[fol. 259d] As stated, complainants rely primarily upon the contention that scrap-iron rates were legally in effect on their shipments. The evidence bearing upon the issue of unreasonableness is meager. The value of the 26 shipments ranged from \$15 to \$30 per ton f. o. b. origin. They moved in open-top equipment, and their average weight was 62,811 pounds. Complainants compare the rates sought to be charged with rates on other commodities which, they contend, have similar or less favorable trans-

portation characteristics. The rate of 61 cents which defendants attempt to charge from various Texas points to St. Louis is compared with a rate of 25 cents on crude sulphur, having a value of \$16 per net ton at the mines, from Freeport, Tex., to St. Louis. This rate was formerly 32.5 cents and was reduced to 25 cents to meet water and motortruck competition. The rate of 61 cents on pipe fittings from Breckenridge, Tex., to St. Louis, 801 miles, is contrasted with rates on lime prescribed on further hearing by the Commission in Lime from, to, and between Points in the Southwest, 205 I. C. C. 282, which, for the same distance, are 32.5 cents, minimum 30,000 pounds, and 26 cents, minimum 50,000 pounds. A rate of 52 cents applies on junk from Texas points to St. Louis. This commodity description covers such articles as scrap aluminum, scrap copper, and scrap lead, valued from \$80 to \$280 per ton. The witness submitting these comparisons could not state the volume of movement or other circumstances under which these commodity rates were established.

Complainants refer to rates based on 17.5 percent of first class, minimum 40,000 pounds, from the Southwest to St. Louis on old railway car wheels, old railway car or locomotive axles, and old railway track rails. These rates are not restricted, as are the scrap-iron rates, to articles having value for remelting purposes only. Here again the record is silent as to the circumstances and conditions surrounding the establishment of the rates instanced. The Commission generally has declined to prescribe lower rates on old or second-hand articles than on like articles when [fol. 259e] shipped new. In *Carnie-Goudie Mfg. Co. vs. Atchison, T. & S. F. Ry. Co.*, 68 I. C. C. 40, 42; Division 3 said that it would be difficult, without affording an easy and convenient means for misbidding and discrimination, and impracticable, to establish ratings on damaged, used, or second-hand articles different from those on like articles new.

In *Prairie Pipe Line Co. vs. Arkansas W. Ry. Co.*, 146 I. C. C. 149, the Commission found, among other things, that the rates on new and second-hand iron or steel pipe between points in the Southwest were unreasonable to the extent that they exceeded 35 percent of first class for single-line hauls and 38 percent for joint-line hauls. The

record in that proceeding showed a very heavy movement of pipe within the territory. The rates applicable on the shipments here considered were in most instances less than the bases there found reasonable for pipe.

We find that the scrap-iron rates collected on the shipments described were inapplicable; that the applicable rates were the class or commodity rates on pipe fittings, plus 10 percent thereof when loaded loose or at random, and that the applicable rates are not shown to have been or to be unreasonable. The complaint will be dismissed.

[fol. 259f] Mr. Houts: And also as reported (there is a slight correction), the same case, in 225 I. C. C., page 319.

Mr. Reeder: These are bound volumes. It has been corrected. The opinion must be introduced in evidence, to be before the Court.

Mr. Rosenblum: I would like to object further to the introduction of this and the corrected opinion, for the further reason that there has been no pleading in this case before your Honor of these reports. There has been no pleading that this case, or this opinion of the Interstate Commerce Commission, which plaintiffs seek to introduce, is res adjudicata of the issues before your Honor. The theory on which it has been offered has not been stated by counsel.

Mr. Houts: I can state the theory. It is evidence of what the correct tariff rate is.

Mr. Rosenblum: That is objected to for the reason that it does not constitute any evidence of what the correct tariff rate is.

The Court: Overruled.

The opinion last offered in evidence is in words and figures as follows, to-wit:

[fol. 259g] Lester A. Crancer and George B. Fleischman, Co-Partners, doing business under firm names of Valley Steel Products Company and Mid-Valley Steel Company respectively, et al.,

No. 27535. / vs.

Abilene & Southern Railway Company, et al.

Decided November 8, 1937.

Upon reconsideration, prior report, 223 I. C. C. 375, corrected in certain particulars.

Appearances shown in prior report.

Supplemental Report of the Commission.

Division 3, Commissioners McManamy, Porter, and Miller, By Division 3:

In the prior report, 223 I. C. C. 375, we found that the rates charged on used iron or steel pipe thread-protecting rings, in carloads, from points in the Southwest to St. Louis, Mo., and East St. Louis, Ill., were inapplicable, and that the applicable rates were not shown to have been or to be unreasonable. The complaint was dismissed.

Our attention has been directed to the fact that the words "rule 5" appearing in line 3 of the last paragraph on page 376 of the report obviously were intended to read "the mixed-carload rule," and that the words "the mixed-carload rule" appearing in line 9 of the first complete paragraph on page 377 were intended to read "rule 5".

We accordingly now find that the prior report should be, and it is hereby, corrected in the particulars referred to above.

[fol. 260] Mr. Reeder: Plaintiffs also offer in evidence the following from the opinion of Klotz Brothers vs. Chesapeake and Ohio Railroad Company, 177 I. C. C. 557:

"Scrap iron consists of old worn out, obsolete, broken and cut iron or dismantled machinery and parts thereof, entirely unfit for original use and having no commercial value except for remelting purposes", that being also found in 98 S. W. (2d) at page 458, and quoted by Judge Booth of the Circuit Court of Appeals of the Eighth Circuit, with approval as the definition of scrap iron.

Mr. Rosenblum: I object to that as not being any evidence, it is not evidence at all, of any kind.

The Court: Overruled.

[fol. 261] Mr. Reeder: We offer in evidence, if we have not already done so, Plaintiffs' Exhibit 1, which is the Stipulation of Facts.

Plaintiffs' Exhibits 2 and 3, I am quite sure were offered and received.

Mr. Rosenblum: I would like to move to strike Exhibits 2 and 3. Your Honor excluded all other exhibits similar to that, and I think those two ought to be excluded also.

The Court: What are they?

Mr. Rosenblum: I think Exhibits 2 and 3 are the reports made by the witness McGrane of this inspection.

The Court: Overruled.

Mr. Reeder: I offer in evidence Plaintiffs' Exhibits 4 and 5, which are thread protectors identified by the witness as being samples from the cars inspected.

Mr. Rosenblum: I object to the introduction of those exhibits in evidence, for the reason that they are not iron pipe thread protectors.

Mr. Reeder: Plaintiffs' Exhibits 4 and 5 have already been offered and received in evidence, but I am reoffering them.

The Court: Objection overruled.

Mr. Reeder: We now offer Plaintiffs' Exhibits 13, 14 and 15, thread protecting rings identified by Mr. Perry.

Mr. Rosenblum: I object to the introduction of those in evidence, because those are rings which were manufactured, some of them, new; there is no showing that they came from these cars, and no showing that they are the same type thread protector contained in these cars involved in this case.

Mr. Reeder: They are helpful to the Court, and the testimony clearly shows that one is a new one, one is reconditioned, and one is in the condition that it is before it is reconditioned.

The Court: Overruled.

Mr. Reeder: Plaintiffs rest.

Plaintiffs rest.

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Mr. Rosenblum: At this time, we would like to move the dismissal of the case, for the reason that the plaintiffs have failed to prove the constituent elements of their case, and we offer what is, in effect, a demurrer to the evidence.

Does your Honor care to hear me on that briefly, say for five minutes?

The Court: No, I don't think so. Overruled.

Mr. Rosenblum: Would your Honor like to start the defendants' case at this time?

The Court: We have twenty minutes. I have other cases set. I think I have some cases set for tomorrow. How long will it take to put on your case?

Mr. Rosenblum: I think one full court day.

At least with the witness I am going to take first, I [fol. 263] would like to have him tell his story uninterrupted, if possible.

The Court: I have a criminal case set for tomorrow and a jury coming here.

Mr. Rosenblum: May I make this one suggestion at this time? I don't see counsel here, but I do see some of the officials of the railroads here. There is a case set on your docket on the 13th of February. I don't want to interpose any of my own private engagements, but this present case has upset us all, and I would like, if possible, that that case be postponed until such time as your Honor can hear it.

(Here ensued colloquy between the Court and Mr. Rosenblum concerning the case set for February 13th.)

Mr. Reeder: We would like very much, if your Honor can endure us, to go on tomorrow with this case, even though we have to be interrupted. Mr. Houts has come here twice from Kansas City.

Mr. Rosenblum: I am satisfied to do that.

Mr. Reeder: May I suggest that we go until tomorrow morning at ten o'clock and take our chances?

At this point, an adjournment was taken until February 6, 1940, at ten o'clock A. M.

[fol. 264] Met, pursuant to adjournment as above, on February 6, 1940, at ten o'clock A. M.

The Court: You may proceed with the case on trial.

Mr. Rosenblum: My clients thought that these other matters would take a little longer. I have telephoned them, so I guess they will be here in a short time.

The Court: We will take a recess.

Mr. Bailiff, announce a brief recess.

(Here ensued a brief recess.)

And thereupon the defendants, to sustain the issues in their behalves, offered the following evidence:

GEORGE B. FLEISCHMAN, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the defendants, as follows:

#### Direct Examination.

By Mr. Rosenblum:

Q. State your name, please, sir.

A. George B. Fleischman.

Q. Speak up so the Court can hear you.

A. George B. Fleischman.

Q. I suggest that you move your chair around that way a little bit, so the Court can hear you.

How old are you, Mr. Fleischman?

A. Forty-two.

[fol. 265] Q. What is your business?

A. I am a partner in the Valley Steel Products Company.

Q. Lester A. Crancer is the other partner?

A. Yes.

Q. How long have you been partners in that partnership? A. Fifteen years.

Q. Where is your present office?

A. 81 St. George Street.

Q. In the City of St. Louis, Missouri? A. Yes, sir.

Q. Does part of your business of the partnership consist of buying and remanufacturing thread protectors?

A. It does.

Q. Over what period of years have you yourself, as an employer or as an employee, had any experience in the remanufacturing or reconditioning of thread protectors?

A. Since the first year we were in business, which is about fifteen years.

Q. How long have these Colona thread protectors been manufactured, to your knowledge?

A. During all that time.

Q. Will you tell the Court what your source of supply of these thread protectors has been?

A. Principally from scrap iron dealers.

Q. Located where, Mr. Fleischman?

A. In the territory commonly known as the oil country, which is Texas, Oklahoma, California, Kansas and some parts of Pennsylvania.

Q. Coming down specifically to the years, we will say, of 1936 and 1937, can you tell us in a general way how, where, and when these thread protectors were gathered [fol. 266] by the scrap iron dealers?

A. Thread protectors first came off of oil country tubular goods, such as casing, tubing and line pipe, all of which are used in the oil industry. When the pipe is ready to be strung in a hole in a well, or along the ground for line pipe purposes, the protectors are removed and thrown on the ground. The scrap iron dealers buy these protectors from the owner and remove them to their own scrap iron yards. This, of course, is also done by the oil companies, who might have occasion to sell them directly, but during the years of 1936 and 1937 there were comparatively few thread protectors sold by the oil companies. The business of reconditioning thread protectors had not at that time assumed anything like the proportions that it did subsequently. The oil companies attached comparatively little importance to their thread protectors. They represented such a small value as compared to any other item used by them that they paid practically no attention to thread protectors. During the first—

Q. May I interrupt you for a minute? When the oil companies would buy the pipe new from the mill, on which

these thread protectors were coupled, we will say, upon which they were screwed, did the oil company pay anything extra for having the pipe shipped to them with the thread protectors on, or was that included in the cost of the pipe, if you know?

A. They did not pay anything extra. At no time has any charge been made by the pipe mills for thread protectors. [fol. 267] We ourselves purchased considerable quantities of pipe. The mill never ships a piece of pipe, especially for oil country purposes, without thread protectors.

Q. Why is that, Mr. Fleischman, if you know?

A. The thread on pipe is readily susceptible to damage and in order to prevent damage to the pipe it must be protected.

Now, I feel that that particular phase of the situation is very much the crux of this entire matter and I would like to elaborate on it.

Q. Go ahead. Give us your explanation in answer to my first question.

A. The development of oil properties has come along in tremendous fashion over recent years. By that I mean that the oil companies, in order to exploit their properties and procure greater quantities of crude oil, have gone in for deeper and deeper drilling. Years ago comparatively small importance was attached to the threads on pipe. An oil well was drilled, for example, in Illinois we drill oil wells four or five hundred feet deep. The production in Texas and Oklahoma was comparatively shallow, reaching a major depth, some years ago, of perhaps three thousand feet. In recent years we all know that it is not uncommon for an oil well to be drilled to a depth of fifteen thousand feet. Twelve thousand foot wells are very common.

Now the significance of that is this: Where you have an oil well of, say, three thousand feet, you run three thousand feet of pipe into it. If a leak occurs in a well, due to [fol. 268] a defect in the thread, while it is costly to pull out the pipe from a three thousand foot hole, it is very obviously so many more times cost'ly to pull the pipe out of a twelve thousand foot hole, two and a half miles of pipe. As a result of the deeper and deeper drilling, the mills who

manufacture the pipe and tubing have come to make the threads on their pipe to a much higher degree of accuracy. If a leak develops in a well of twelve thousand feet due to a defect in the threads, there is not only a great deal of loss of oil, but there is a tremendous amount of labor involved in pulling that pipe out and replacing it.

Engineers of the pipe mills have carried the process of accurate threading to almost unlimited degrees. The threads on pipe, in the pipe mills, are examined with microscopic instruments. They have to be, and are, microscopically perfect, down to the fraction of a thousandth of an inch as to size and shape. As a result of that condition, the extreme accuracy of threading on oil country pipe, and matter of protecting those threads has occupied equal importance. So that, the matter of protecting threads, in 1937, when drilling was carried on, was one that was looked upon by the mills as of great importance.

When we first started in the reconditioning of thread protectors and resale to the mills the matter of reconditioning was a very simple one—a matter of cleaning up, taking rust and dirt off, and shipping them to the mills and [fol. 269] they were acceptable. That went on until, oh, I would say around 1930.

In 1930 we found ourselves in a position where we couldn't sell one single thread protector to the mills and for a period of some four or five years we were unable to sell a reconditioned thread protector to the mills, because the mere cleaning and making a nice appearance of the protector, and perhaps even retracing the threads, was not sufficient to meet the requirements of the mills. A protector reconditioned as we did it then would do more damage to the pipe than possibly not to use any protector at all. A thread protector with bad threads or that was slightly out of round, which would bind when it was screwed on to the pipe, would tear the thread on the pipe and would damage it badly; perhaps not to the naked eye, but the damage was there and brought bad results when the pipe was screwed into the hole.

So, as I say, for a period of some four or five years it was impossible for us to sell any thread protectors to the mills and we did not sell any to the mills.



During that time we exercised that ingenuity that we possessed in ourselves, and in the engineers in our organization, to find some manner that would permit the reconditioning of thread protectors to the point where they would be acceptable to the mills, having in mind the great degree of accuracy on the pipe and the care which must be [fol. 270] exercised in protecting the threads on the pipe.

Q. Now, as far as the years 1936 and 1937 are concerned, or, let us take the year 1937: Was it possible to take thread protectors as they were shipped to you from the scrap iron yards and sell them in their then condition to any mill?

A. No, sir; it was not.

Q. Will you tell the Court, before you would resell any of these thread protectors, whether or not it was necessary that every single one of them should go through a process of remanufacturing or reconditioning?

A. Yes, it was essentially necessary.

Q. In other words, to make my question a little more plain: Were there any thread protectors that came to you in 1937 that could be wiped off and sold to the mill?

A. No, sir; it was utterly impossible.

Q. And the reason you have stated to us?

A. Yes, but I doubt if I have made clear, or carried far enough the situation with respect to the reconditioning.

Q. I intend to come to that, Mr. Fleischman. So, you say that it was necessary to recondition or remanufacture every single one of the thread protectors that came to you; is that correct?

A. Without exception.

Q. Will you tell the Court what that process was?

A. Will you hand me, please, that piece of pipe (indicating)?

(Counsel handed pipe to the witness.)

[fol. 271] A. (Continuing) I have brought this into court so that I may give some idea in a visual manner of some points that may not be clear.

For example, the Western Weighing and Inspection Bureau's inspectors, who testified here, made some point of the fact—

Mr. Reeder: We must object to this. This gentleman is a witness and is not here to comment upon the testimony of other witnesses.

The Court: Sustained. You have able counsel and he will make all the necessary arguments.

The Witness: I am sorry.

Mr. Rosenblum: Suppose you then just tell us the reconditioning process, Mr. Fleischman.

A. These protectors are brought into the plant and the first operation is to separate those that will obviously not stand reconditioning.

Q. What kind are those, Mr. Fleischman?

A. A protector that is too far out of round and we can see that it can not be brought back into a perfectly concentric condition, which is essential. Any protector that is broken, or the surface is badly scarred or marred, or any protector in which the threads are so corroded as to make it impossible to rethread.

Q. They are put to one side, are they?

A. Yes, sir, they are put to one side and we never at [fol. 272] tempt to recondition them, because the reconditioning process is expensive and we obviously don't want to spend money on doing something that will never bring the desired result.

Then they are put through—

Q. The remaining ones, you mean?

A. The remaining ones are put through a bath that takes all the dust and dirt and grease off. Now, when these thread protectors go into the field they are screwed on to the pipe. The pipe is ready to put in the hole, or to be unloaded, if it is not ready to be put in the hole, and put in the warehouse. The pipe is upended off the car and dropped to the ground. The purpose of that protector is to prevent any damage to the threads when the pipe is taken out of the box car.

Now, we take a piece of 85% pipe, like that protector came off (indicating)—

Q. Exhibit D?

A. Yes. That pipe weighs approximately forty pounds to the foot. It is thirty feet long and will therefore weigh

1200 pounds. Now, that thread protector is approximately one-quarter of an inch thick.

Q. You mean—

A. The wall thickness. Here is a piece of 1200-pound pipe upended out of the car and dropped to the ground and it strikes the ground down here on the protector (illustrating). Here is a 1200-pound piece of pipe protected by a piece of steel one-quarter of an inch thick, and [fol. 273] the great weight of that pipe is right on the protector. When it hits the ground a dent is put into it. It throws the protector out of round. If, after thoroughly cleaning it and rethreading it you attempted to screw that protector on another piece of pipe its out of round condition or eccentric condition would cause it to bind. It might be screwed on the pipe by using force, but every thread that was screwed would cause damage to the thread on the pipe.

It is of the utmost importance that every protector we furnish the mills be completely round or concentric. The men in the mill will screw eccentric protectors on the pipe. The damage will not be discovered until after the pipe is in the hole, when the damage will be greater than if it was found before then.

The reason that we found it necessary to discontinue the sale of thread protectors for a number of years was because we couldn't find a way of making those thread protectors round, at a commercial cost that would still make it possible to do the work and sell the protectors at a profit. We finally discovered a method. We patented it—

Q. What was it?

A. It, in mechanical terms, is called counterering.

If a protector is out of round it is obvious that a plug could be inserted in it and change that diameter and [fol. 274] straighten out the out of round condition; in other words, push out the indentation, but that would, of course, stretch or change the diameter of the thread protector and it would be useless for that reason. What we endeavored to discover was the method of flowing the metal, taking the indentation or irregularity in the surface out, without changing the diameter of the protector.

or damaging the threads while the plug was inserted. We had an eight-foot die on a spring. This protector and all protectors are inserted into it. A plug is introduced into that die, and with a 300-pound press, with a slow stroke but enormous pressure, we force that plug through the die and any irregularities are flowed out of the surface of the metal.

Q. What do you mean by "flow"?

A. We can all picture the flow of molten metal. It is a little bit hard for us to picture the flow of cold—this is a strictly cold process, but exactly that condition happens in the cold metal. The indentation is straightened out and the surface becomes straight, and in straightening it out the contour maintains approximately one hundred per cent. roundness. We have a concentric condition as a result of pressing the irregularity out of the metal. We reform—we actually reform the contour. If there is an indentation in it, as practically all of these have, we must change the form, change that irregularity in its roundness. We press it out. Until that is done we don't have a perfectly round thread protector. That operation, as I say, we have patented, and one hundred per cent. of our thread protectors go through this operation.

When the protector is perfectly round it is passed then to the chuck, to fasten it into a machine so that it will run true. It is necessary to have a protector run true, because we rechase the threads. If the protector was not running true the rechasing operation would not be accurate, the tool would impinge from one thread to another, and this operation serves the double purpose of making the protector round, from a use standpoint, and from the standpoint that it can be chucked in a machine, so that it will run true.

Q. When it is rethreaded? A. Yes.

Q. What is meant by "rechasing"?

A. Well, the distinction between threading and chasing is simply that we don't run a full thread. Every one of these protectors has some damage to the threads, particularly what we call the nipple, which is the thread on the outside, as a male thread. If you will unscrew one of those I will be able to demonstrate that (indicating exhibit).

This thread on the outside here (indicating), just one piece banging against another will damage that and if the top of this thread is damaged, when it screws into the coupling on the other end of the pipe, if you can imagine that being that small, it will damage this coupling. To [fol. 276] make this clear: A piece of pipe is shipped from the mill with this thread on one end and a coupling on the other end. The outside protector screws on to the pipe. The inside protector screws into the coupling to protect the thread on the coupling. It is just as essential for the threads on this coupling to be perfect as it is for the threads on the pipe to be perfect, because, whether it is a damage to the threads in the coupling or damage to the thread on the pipe, equally bad results will be secured.

Now, I have never seen a nipple—not one, come into our plant that did not have some damage to the threads. These threads must be retraced, re chased, and there, again, we patented a chasing tool that enables us to remove any burrs, any whiskers, as we call them, any imperfections. When we get through with the protector the threads are perfect, and it is an operation that is a piece by piece operation, not a hit or miss proposition. One hundred percent. of the rings and nipples that go out of our plant are rethreaded after the reforming operation. Now, after we have reformed and after we have rethreaded, these rings and nipples are sent to the gauging department.

The Court: Sent where?

The Witness: Sent to the gauging department. In that department we have a piece of pipe furnished to us by each of the mills of the size in which they buy these thread protectors. The mills also furnish us with a coupling in each size. That coupling and that piece of pipe furnished by the mill are used as templates or guides.

By Mr. Rosenblum:

Q. How do you spell templates?

A. T-e-m-p-l-a-t-e-s. We screw one hundred per cent. of all of our protectors on this pipe. It must screw on



freely but not too freely. It must run up all the way, cover the threads completely. Then we run it back three threads to see if it won't come off. The same thing is done with the couplings, and it is a frequent, common occurrence with us, after the gauging operation, to send the protectors back to the punch press as much as six times before a perfect fit is secured.

When we put these steel pieces in the punch press we don't know how much flow to put in the metal. It may be  $1/32$ d or  $1/8$ th of an inch. We can only tell after the ring has gone to the gauge department. If we find it is either too big or too tight it has to come back for another reforming and frequently they are reformed six times, and frequently, in the course of reforming, the protector breaks and we have to scrap it entirely.

That covers the reconditioning process.

Q. Would you say, with reference to the seven cars involved in this suit, that that process had been performed upon the entire contents of those cars, except for those which were first sorted out as being utterly valueless?

A. Yes, positively.

[fol. 278] Q. Will you tell the Court your experience and observation of where these thread protectors are kept in the scrap iron yards and where you have seen them?

A. Well, they are kept anywhere in the yard where available space is had. They are stored in the open, piled up just like any other iron handled by the scrap iron dealer.

Q. Is there any difference now—we will say in the years 1939 and 1940, between the method by which these protectors were accumulated, and in 1937?

A. Yes, I would say there is a difference.

Q. What is it?

A. In the last two or three years, by virtue of the fact that we have been able to sell large quantities of these thread protectors to the mills, there have been a good many people who got the idea that they could do the same thing, and there has been a good deal of competition for the purchase of these thread protectors in the field.

Q. Was that true in 1937?

A. No; that is now, not in 1937. I say it is a condition that has prevailed recently. As a result of that competition it has naturally forced the price up; that is supply and demand.

Q. In the early part of 1937, were the prices of these thread protectors to you in the field higher or lower than they were in the summer of 1937?

A. They were higher.

Q. Can you say how much?

A. Fifty per cent.

Q. Have you ever seen loads of thread protectors come [fol. 279] into scrap iron yards in southern territory?

A. Very frequently.

Q. How did they look in a general way, Mr. Fleischman?

A. In 1937, the purchase of thread protectors was limited almost to ourselves. There were a few small dealers who would buy in the proportion of—I think this is quite accurate—one car to one hundred cars we would buy.

In 1937, we estimated—and we had made a pretty accurate survey—that there were available in the oil fields of the United States, 35,000 tons of thread protectors lying in the fields, in scrap iron yards and in warehouses. Those thread protectors had been accumulated from pipe that had been set in the hole as much as fifteen years before.

Q. How do you know that?

A. The design of the thread protectors. The original manufacturer has several times changed the design and we could tell by the shape, the flange and the inside construction, about how long ago the protectors had been made. We could tell by the sizes. For example, nine inch O. D. pipe has been obsolescent for practical purposes in the oil field for about eight years. Yet, in 1937, we were getting tons and tons, hundreds of tons, of nine inch O. D. pipe.

Q. You mean—

A. Protectors off of nine inch O. D. pipe. That is why we knew and were positive protectors were then on

hand in scrap iron yards, in the oil fields and in oil companies' warehouses, that had been taken off the pipe as much as ten years previously.

Q. That type of thread protector which you have just described, would that come in these shipments that came in these cars in 1937, to you? A. Yes.

Mr. Reeder: What type was that?

Mr. Rosenblum: The type he has just testified to.

Mr. Reeder: That is not a Colona?

The Witness: Yes, that is a Colona. I am speaking specifically of Colona thread protectors.

By Mr. Rosenblum:

Q. What was the apparent condition on the surface of these thread protectors that you have just described?

A. By virtue of the fact that these thread protectors had lain in the fields, exposed to the air, oxidation for a period up to ten years, they were badly corroded and rusted. They were bent. This doesn't apply to all of them, but a very substantial quantity. In all cases, the condition was such as to make it impossible to use them for the original purpose without complete remanufacture.

Q. Now I show you an exhibit that has been marked Exhibit D, which you have had in your hand, and ask you to state whether the cars that are in question here contained thread protectors such as this Exhibit D, in the approximate condition in which you now see it.

A. Yes, they did.

Q. Will you describe the condition of Exhibit D, from [fol. 281] a technical point of view.

A. This protector is quite badly oxidized, which is another term for rust. It is out of round in a half dozen places.

Q. Can you show that, can that be seen with the naked eye? A. Yes.

Q. Point out to the Court where those places are, if you will, please.

(Witness indicates to the Court and has private colloquy with the Court.)

The Witness: The threads are quite badly rusted and would require almost complete re-chasing. This protector

would have to be reformed a number of times to make it concentric. It would be quite a task to clean this. The rust has adhered to it for such a long period of time that we might never be able to get the rust and dirt off of it.

Q. Would you say that that was, or was not, a fair example of the thread protectors contained in these seven cars?

A. I would say it was a fair example of half the protectors in the cars.

Q. What about the other half?

A. Of the other half, material coming from these points that are in question, I would say—to make a general classification, that ten per cent. would be worse and forty per cent. would be in better condition.

Q. Did you have occasion to examine, and direct employment of [fol. 282] ployees to examine, the contents of these cars?

A. Yes.

Q. How did that happen, Mr. Fleischman?

A. Well, at that time we had a matter of this hearing before the Commission.

Q. That had taken place in 1936?

A. Yes. It was a subject that was very close to our hearts and minds, and our employees, who were charged with the duty of examining the general contents of the cars, were given specific instructions with respect to the examination, and I, myself, made it a point to look over every car that came in.

Q. I think you started to say something about the Western Weighing and Inspection Bureau thread protector samples here, Plaintiffs' Exhibits 4 and 5: Would you say that this Exhibit 4 was a fair representation of the condition of the thread protectors that were in those cars? A. No, sir, it is not.

Q. Why not; in what respect was it not?

A. Well, every one of those cars was enroute a minimum of six days. They were shipped in open cars. I don't attempt to tell you this from memory, but from the standpoint of the physical impossibility. Those protectors were shipped in open cars, were enroute, exposed to the weather, the sun, the rain, and moist air, for that period of time. It is impossible for steel to be exposed for six days and not be very much more badly rusted than those protectors.

[fol. 283] Q. As a matter of fact, Mr. Fleischman, would you find thread protectors, or did you find thread protectors in these cars, that are like Defendants' Exhibit 4?

A. I would say there would be a few.

Q. By "a few" how many would you say?

A. A half dozen.

Q. Could you estimate roughly, or is there any way of estimating roughly, how many thread protectors there are in a car? A. Yes, sir.

Q. How many are there ordinarily in the average car? These cars ran around sixty thousand pounds, I think.

A. That will run from five thousand to twenty thousand pieces. That is rough, but it will serve our purpose.

Q. Are all thread protectors shipped in open coal cars?

A. Open cars, coal cars.

Q. Would there be any way for an inspector, who walked over the top of those cars, where the protectors were loaded four to five or six feet deep in the car, to tell what the condition of the thread protectors was?

A. There would be no way whatever, except what he could see at the top of the car.

Q. Would a man who had no technical experience, who didn't even know whether a thread protector was iron or steel, or didn't know anything about the process of reconditioning, such as you have described, be in a position to say whether or not any of these articles were fit for the purpose for which they were originally intended, in those [fol. 284] cars that came in?

Mr. Reeder: That is objected to as calling for a conclusion, as to what—

The Court: Read the question.

(Last previous question read to the Court.)

The Court: Objection sustained.

Mr. Rosenblum: Could a person not engaged in the remanufacturing or reconditioning of thread protectors tell whether or not these thread protectors were fit for the purpose for which they were originally intended?

Mr. Reeder: Same objection. It is speculative and calls for a conclusion.

The Court: Objection sustained.



Mr. Rosenblum: What information or what knowledge would a person have to have before he could tell whether or not the thread protectors contained in those cars were fit for the purpose for which they were originally intended?

Mr. Reeder: Same objection.

The Court: Sustained.

Mr. Rosenblum: I offer to show by this witness that before any person could tell whether or not these thread protectors were fit for the purpose for which they were originally intended, they would have to be acquainted with the process of reconditioning, such as this witness has described, and would have to be acquainted with the use and general character of the thread protector.

[fol. 285] Mr. Reeder: I object to the offer of proof, for the reasons heretofore stated.

The Court: Sustained.

By Mr. Rosenblum:

Q. What are these thread protectors made of?

A. Steel.

Q. Could they be made out of iron?

A. No, sir.

Q. Why not?

A. That goes into a rather long story about the difference between iron and steel.

Q. Briefly, tell us why.

A. I don't know if I can tell you briefly.

Mr. Reeder: I object, unless the witness is qualified. It is immaterial to any issue in this case, your Honor.

Mr. Rosenblum: Perhaps so. I thought for your Honor's information you might like to hear it.

The Court: Is it a matter of common knowledge that iron is softer than steel?

The Witness: I don't think so, your Honor. It goes a good deal further than that.

Mr. Reeder: We are dealing with thread protectors and the tariff.

Mr. Rosenblum: I thought your Honor might like to know,

Mr. Reeder: I haven't objected, but I don't think any of this testimony is really material.

The Court: I was wondering why you did not object. You have been very much interested.

Mr. Rosenblum: I show you Defendants' Exhibit E— [fol. 286] Mr. Reeder: I was interested with a report and for that reason I didn't object.

The Court: I don't know where it is going to lead to. I thought probably you might have something in your mind.

Mr. Rosenblum: Would your Honor mind pointing out just what particular—I thought it was all relevant. Was there any particular field of the examination that you thought was not relevant?

The Court: No. I thought perhaps you were going to lead up to something to show how you handled this, as a result of this examination, but I have never been able to get a perfectly clear picture.

Proceed.

Mr. Rosenblum: The testimony that you have given the Court so far with reference to the reconditioning of these thread protectors—

The Court: I don't think it is right for the Court to tell you.

Mr. Rosenblum: I thought if there was any doubt in your Honor's mind about any specific thing I would try to elucidate it.

Q. I will ask you this question, Mr. Fleischman. Have you ever bought or sold scrap iron? A. Yes.

Q. Could you tell the Court some of the classifications of scrap iron?

A. No. 1 steel, No. 2 steel, bushings, country iron, cast [fol. 287] iron scrap, malleable iron scrap, rails, high speed steel scrap, tool steel scrap.

Q. Over what period of years have you bought and sold scrap iron? A. Fifteen years.

Q. I will ask you to state whether or not the material shipped in these seven cars had any commercial value other than for remelting purposes.

Mr. Reeder: That is objected to. That calls for a conclusion of the witness.

Mr. Rosenblum: At the time it was shipped.

Mr. Reeder: The test is what was actually done and what they did with it.

Mr. Rosenblum: Read the question.

(Last previous question read.)

The Court: He may answer.

A. The material shipped in these cars had no commercial value whatever, other than for remelting purposes.

Mr. Rosenblum: May I see your eight exhibits, Mr. Reeder, covering these inspections?

Mr. Reeder: I haven't got them separated.

Mr. Rosenblum: You can show them to me one at a time.

Q. Calling your attention to the car shipped from Shelby, Montana, which is Count 1 in the petition, do you know who George Pellett, the consignor, was? A. Yes.

Q. Who was he? A. A scrap iron dealer.

Q. Where was he located?

A. Well, he works in the Rocky Mountain territory.

[fol. 288] Q. Were these protectors shipped as scrap iron?

A. Yes, sir.

Q. Did they come out of his scrap iron yard?

A. Yes.

Q. Calling your attention to Exhibit No. 6—

Mr. Reeder: I want to ask that that answer be stricken out as a conclusion of the witness and not the best evidence. The shipping records are the best evidence as to how they are shipped and how billed; and, furthermore, it is immaterial how the shipper bills it or ships it.

The Court: Sustained.

Mr. Rosenblum: Calling your attention to Plaintiffs' Exhibit No. 6, the shipment from Wickett, Texas: The consignor there was the Gulf Oil Corporation, Gulf Division: Do you know where those thread protectors were from?

Mr. Reeder: That is objected to, unless he knows from his own knowledge. I am going to try to limit this to the rules of evidence.

The Court: Sustained.

Mr. Rosenblum: If you know of your own knowledge; do you know?

A. Yes, sir.

Mr. Reeder: Were you there?

The Witness: I have been through that country frequently, have contacted all of the shippers time and again, and am familiar with their premises.

Mr. Reeder: I still object, your Honor, that it—

[fol. 289] The Court: Read the question.

(Last previous question read.)

Mr. Reeder: It would necessarily be based on hearsay. The record would necessarily be the best evidence.

The Court: He may answer.

A. Those protectors were gathered from various leases within a radius of a hundred miles of the point from which they were shipped.

Mr. Reeder: I ask that the answer be stricken out, because it is necessarily based on hearsay. He was not there. He admitted he was not there.

The Court: Let him tell how he knows it.

Mr. Rosenblum: How do you know it, Mr. Fleischman?

A. We have had a good deal of correspondence regarding this particular earload.

Q. With the Gulf Oil Corporation?

A. With the Gulf Oil Corporation, yes, and it was a question at the time we made that purchase of how we could accumulate the material to a certain point without the accumulation cost being prohibitive, and I recall very well that we made a deal whereby the Gulf Oil Corporation agreed, and did bring them in from the leases to a certain point from which shipment was made.

Mr. Reeder: It appears that his testimony is based on correspondence, and, therefore—

The Court: It will stand, subject to the objection.

By Mr. Rosenblum:

Q. Taking Plaintiffs' Exhibit 7, which is a shipment in [fol. 290] volved here, of car MP 73665, from the Federal Machine and Supply Company: Do you know where they are located? A. Yes.

Q. Where? A. Kilgore, Texas.

Q. What is the Federal Machine and Supply Company, who are they?

A. They buy and sell second-hand oil well supplies and materials.

Q. Referring to Plaintiffs' Exhibit No. 11, I find this refers to a shipment from Lamont, California, consignor Mohawk Petroleum Company: Do you know where that originated?

A. No, I am not familiar with that shipment.

Q. A shipment from Lake Charles, Louisiana, which is car No. 17421 T & P, Plaintiffs' Exhibit 12, the consignor was Lake Charles Paper S—Paper Stock Company is that? A. Yes.

Q. Do you know their business? A. Yes.

Q. What is it?

A. They are waste material dealers.

Q. Dealing in scrap iron and scrap metals?

A. Yes.

Q. Plaintiffs' Exhibit No. 8: The consignor was Hobbs Pipe and Supply Company, from Odessa, Texas: Do you know where they came from?

A. Hobbs, New Mexico. They are scrap—

Q. Hobbs Pipe and Supply Company? A. Yes.

Q. Do you know what sort of yard they have?

A. Yes.

Q. What kind of yard is it?

A. It is an unfenced yard with a little office on it, out in the open. All their material is stored in the open.

[fol. 291] Q. Plaintiffs' Exhibit No. 3 is a shipment from Rodessa, Louisiana, consignor, Louisiana Iron Supply Company, car PLE 44572: Do you know who the Louisiana Iron Supply Company are?

A. They are —



Q. What are they?

A. They are dealers in new and used oil well supplies and equipment.

Q. How were their thread protectors kept, if you know?

A. Stored out in the yard, in the open.

Q. Calling your attention to Defendants' Exhibit B, I will ask you to state whether these seven cars contained thread protectors such as Exhibit B.

A. It contained some, yes.

Q. Is Exhibit B in such shape that it is fit to be remanufactured? A. No, sir.

Mr. Rosenblum: Will your Honor excuse me for just a minute?

That is all, your Honor.

#### Cross-Examination.

By Mr. Reeder:

Q. Mr. Fleischman, is your company in the business of remelting scrap iron? A. No, sir.

Q. Have they ever been in that business?

A. No, sir.

Q. Did you ever buy any scrap iron for remelting purposes? A. No, sir.

Q. All of the thread protectors that your company purchased in 1937, and other years, you bought them with the intention of reconditioning them?

Mr. Rosenblum: That is objected to, because his intention in buying them is not in issue in this case.

Mr. Reeder: Intention and purpose.

Mr. Rosenblum: The question is what are these articles in those cars, not what his intention is.

The Court: Sustained.

Mr. Reeder: What was your business, sir, what business were you engaged in?

A. The manufacture of iron pipe fittings and in the remanufacture of thread protectors.

Q. Were those thread protectors that you bought in the open market for the purpose of reconditioning and selling again?

Mr. Rosenblum: That is objected to for the same reason, your Honor.

The Court: Sustained.

Mr. Reeder: What did you do with the thread protectors, second-hand thread protectors, that you bought?

Mr. Rosenblum: Same objection.

The Court: Sustained.

Mr. Reeder: I feel, your Honor, that he has already gone into it. He has asked him what he did, quite at length. He bought these thread protectors. He has also shown by him that they had value only for remelting purposes. I have a right to cross-examine him, to show that he didn't [fol. 293] buy them for that purpose and didn't use them for that purpose. I think on that theory it is admissible.

(At this point counsel orally argued their respective contentions and read to the Court from various cases.)

The Court: Each one of you give me the case that each of you thinks is controlling and I will read them.

Mr. Rosenblum: Shall I first, or Mr. Reeder?

The Court: You give me yours.

Mr. Bailiff, announce a brief recess.

(At this point a brief recess was had.)

Thereupon the Court returned to the court-room and announced a recess until two o'clock P. M.

[fol. 294] After recess, on February 6, 1940, at two o'clock P. M., the following proceedings were had:

The Court: You may proceed.

#### Cross-Examination.

Resumed by Mr. Reeder:

The Court: Is there a question pending now?

(Last previous question read as follows:

"Q. What did you do with the thread protectors, secondhand thread protectors, that you bought?")

The Court: Overruled. He may answer.

Mr. Reeder: Will you answer the question, please, sir?

A. We remanufactured them.

Q. When you say "remanufactured" you mean you reconditioned them and sold them for the purpose for which they were originally used?

Mr. Rosenblum: That is objected to as—

The Court: Overruled.

A. No, sir; I feel that there is a definite difference in the two terms.

Mr. Reeder: You have already testified quite in detail as to what you did with these protectors in reconditioning them for resale, have you not? A. Yes.

Q. Mr. Fleischman, your company, or you and Mr. Crancer acting as partners, under the style of Valley Steel Products Company, for many years have purchased where [fol. 295] where you could thread protectors to be reconditioned, have you not? A. Yes.

Q. And that has been your general business, has it not, your principal business? A. No, sir.

Q. That has been a division of your business?

A. Yes, sir.

Q. I believe you said that you don't buy scrap iron to be remelted?

Mr. Rosenblum: That is objected to as having no relevancy to any issue in this case.

The Court: Overruled.

By Mr. Reeder:

Q. You don't remelt scrap iron in your place, do you?

A. We don't at present.

Q. Have you at any time been in the business of buying up scrap iron for remelting purposes? A. Yes, sir.

Q. Were you in that business in 1937?

A. I think we were.

Q. Do you know definitely whether you remelted any scrap iron in 1937? A. I am quite sure we did.

Q. Would your books and records show whether you did or did not? A. Yes.

Q. When you bought these thread protectors, Mr. Fleischman, you designated what sizes you wanted and could use, did you not? A. No, sir.

Q. You did not do that?

A. Not as a general practice.

Q. Is it not a fact that you designated in your offer of purchase the sizes that you could use?

[fol. 296] Mr. Rosenblum: That is objected to unless it relates to these cars in question.

Mr. Reeder: I mean, over the course of years, in 1936 and 1937.

Mr. Rosenblum: That is objected to as not being relevant to any issue.

Mr. Reeder: It has this bearing: It goes to his credibility. If he bought these thread protectors for remelting purposes the size would not be important. I am going to show by this witness that he designated the sizes and the kind that he wanted and offered to buy and did buy. That is my point.

The Court: Confined to the period in question in these shipments?

Mr. Reeder: Over a course of years. Even in 1936, prior to this, he was in the general business. This was not an isolated transaction.

The Court: I understand that, but it seems the question ought to be limited to the particular time of the transactions in question.

Mr. Reeder: Let us take the year 1936, the year immediately before 1937. Did you designate in your offer of purchase the particular size that you could use?

Mr. Rosenblum: I have objected to that and I thought you sustained that.

Mr. Reeder: I am coming up to it. I am taking a year [fol. 297] prior to that and will bring it up to this date; bring it up to the present time.

Mr. Rosenblum: I don't think that is material and I object to it for that reason.

The Court: Overruled.

The Witness: What is the question?

By Mr. Reeder:

Q. The question is, did you designate what sizes you wanted or would buy, and what you would not buy?

A. Not as a general practice.

Q. Did you designate the particular kind of thread protector that you could use?

Mr. Rosenblum: By "kind" you mean what?

By Mr. Reeder:

Q. I will ask you, is it not a fact that you told the trade that you only could use and would buy the Colona type thread protectors?

A. No, sir; it is not a fact.

Q. It is not a fact?

A. Not as a general practice.

Q. Who is your Purchasing Agent?

A. I do most of the buying myself.

Q. You have a Purchasing Agent, haven't you?

A. Not for some time.

Q. Did you have a Purchasing Agent in 1936?

A. I think we did, yes.

Q. What was his name?

A. When you speak of Purchasing Agent, actually the buying was done by myself and my partner. We might [fol. 298] have someone sign as Purchasing Agent.

Q. Did you have anybody that signed correspondence as "Purchasing Agent"?

A. I don't remember, in three years—I don't remember who would sign as Purchasing Agent.

Q. Did you not have one man who was Purchasing Agent and who signed in 1936, and who signed in 1937, and who signed in 1938 and 1939 as your Purchasing Agent? A. No, sir.

Mr. Reeder: I ask that this be marked as an exhibit.

(The document indicated by counsel was marked Plaintiffs' Exhibit 16.)

Q. I show you a letter that has been marked Plaintiffs' Exhibit 16, dated July 2, 1936, on the stationery of the Valley Steel Products Company and the Mid-Valley Steel Company, and ask you who signed that letter.



A. I don't know who signed it. I know whose signature—the signature.

Q. Whose signature is it? A. F. Corgiat.

Q. That is F. Corgiat? A. That is right.

Q. Was he not your Purchasing Agent?

A. No, sir.

Q. He signed as Purchasing Agent, didn't he?

A. That is right.

Q. That is his signature, is it?

A. I don't think it is.

Q. You say he is not the Purchasing Agent and was not the Purchasing Agent at that time?

The Court: Let the witness answer.

[fol. 299] By Mr. Reeder:

Q. Answer the question, if he was not your Purchasing Agent at that time. A. No, sir.

Q. Did he not have the title of Purchasing Agent at that time? A. No, sir.

Q. That is a letter that went out of your place of business? A. Yes.

Q. To the Gulf Refining Company.

Mr. Reeder: I offer this in evidence.

Mr. Rosenblum: I object to its being offered in evidence. If your Honor will look at it you will see it has absolutely no value. It doesn't tend to prove or disprove any issue in this case.

The Court: Let me see it (examining exhibit).

Mr. Rosenblum: It is dated in 1936, and is not material to this case, and doesn't prove or disprove any issue in this case.

The Court: Overruled.

Mr. Reeder: Shall I read it, or has your Honor read it?

The Court: I have read it.

Plaintiffs' Exhibit 16, last offered in evidence, is in words and figures as follows, to-wit:

[fol. 300] (Plaintiffs' Exhibit 16.)

-(Letterhead of Valley Steel Products Co.)

"Saint Louis, Mo.  
July 2, 1936.

Gulf Refining Co.,  
Port Arthur, Texas.

Gentlemen:

Now—we offer \$20.00 per net ton F. O. B. shipping point for Colona (Bell type) Thread Protectors in all sizes—both inside and outside protectors—from 2" to 16" inclusive.

If you have or can secure a carload of either inside or outside protectors, or both, wire us collect immediately, and our Purchase Order with shipping instructions will go forward to you at once.

If more convenient, you can jot your reply in the space below and return this sheet in the postage-free envelope enclosed.

This is a bona fide offer and we mean business. Terms are strictly cash. Let us hear from you—Today.

Very sincerely,

VALLEY STEEL PRODUCTS CO.,  
F. Corgiat, Purchasing Agent."

FC:MT

[fol. 301] By Mr. Reeder:

Q. In 1936, you were offering \$20.00 net, f. o. b. shipping point, for Colona thread protectors, in sizes from two to sixteen inches, weren't you? A. Yes, sir.

Q. You designated that the sizes were to be from two inches to sixteen inches at that time, did you?

A. Yes. That is all the sizes there were. There are not any others.

Q. Your place of business at that time was at 2700 South First Street? A. Yes, sir.

Mr. Reeder: I offer the air mail envelope addressed to Mr. Fritz Mayer, as Plaintiffs' Exhibit 17.

Mr. Rosenblum: I den't see the purpose. There is no denying that the letter was sent.

The Court: Overruled.

Mr. Rosenblum: It doesn't prove any issue in this case.

Plaintiffs' Exhibit 17, last offered in evidence, is in words and figures as follows, to-wit:

(Plaintiffs' Exhibit 17.)

"Mid Valley Steel Co.,  
2700 So. First St.,  
St. Louis, Mo.

Via Air Mail

Mr. Fritz Mayer,  
P. O. Box 1225,  
Kilgore, Texas."

[fol. 302] Mr. Reeder: I will ask that this be marked as Plaintiffs' Exhibit 18.

(The document referred to by counsel was marked Plaintiffs' Exhibit 18.)

Q. I will ask you this: Did you have an inspector, a man in the field who inspected these protectors and supervised their loading, Mr. Fleischman?

A. Not as a general thing, no, sir.

Q. Did you ever have a man in the field to buy the protectors and make inspections at the point of origin and assist in the loading of them?

A. I don't remember.

Q. Is it not a fact that you had several men at designated points, whose business it was to inspect the protectors that you were buying, to see that they were in good condition and to supervise in the loading, to see that they were not damaged while they were being loaded?

A. No, sir, it is not.

Q. I will show you a letter that has been marked as Plaintiffs' Exhibit 18, on the stationery of Mid-Valley Steel Company, signed F. Corgiat, Purchasing Agent, addressed to Mr. Fritz Mayer, under date of July 8, 1936,

and ask you if Mr. Corgiat was your Purchasing Agent at that time.

A. Mr. Corgiat was never our Purchasing Agent.

Q. He signed as Purchasing Agent, did he not?

A. Yes.

Q. Did you know he was signing as Purchasing Agent?

A. Not positively, no.

Q. You didn't know it? A. No, sir.

[fol. 303] Q. That is one of your letters, that went out of your place of business, isn't it?

The Court: What did that gentleman do there?

The Witness: We preferred, your Honor, not to have our individual names mentioned in writing some of these letters, for certain business reasons of our own, and, while Mr. Crancer and I actually did the buying and the correspondence regarding the purchase, someone else in the—

The Court: You simply held this man out to the public as Purchasing Agent?

The Witness: Yes; we created a certain identity.

By Mr. Reeder:

Q. Why did you not do it?

A. Because we were creating a certain man in the organization as identified with the buying.

Q. You wanted to mislead the public, did you not?

A. No. We didn't mislead at all. That is a common practice.

Mr. Reeder: I offer this letter in evidence (reading Plaintiffs' Exhibit 18).

(Plaintiffs' Exhibit 18.)

"Saint Louis, Mo.

July 8, 1936.

Mr. Fritz Mayer,  
P. O. Box 1225,  
Kilgore, Texas.

Dear Mr. Mayer:

We have for acknowledgment your letter of July 5th and note that you have on hand a large carload of Colona protectors which is located in Louisiana. We also note that

you will shortly be in position to dispose of a carload of protectors from a West Texas point.

[fol. 304] We can use all sizes from 2" to 16" inclusive, both outside and inside protectors, at \$20.00 per net ton f. o. b. shipping point. However; we can not use any of the heavy collar type mentioned in your letter. We can use Colona type only."

This is the point that I want to stress, your Honor: "Another point"—

Mr. Rosenblum: Is that part of the letter?

Mr. Reeder: I am reading part of the letter.

Mr. Rosenblum: He says, "This is the point I want to stress".

The Court: Are you objecting to that?

Mr. Rosenblum: Yes, I object to a remark like that in the midst of a letter.

The Court: Sustained.

Mr. Reeder: The letter mentions it.

"Another point we would like to mention is the necessity for using all reasonable care in loading the protectors, so that the threads are not marred or mutilated. When the threads on the inside protectors are damaged, they will not screw into the couplings and can not be used. And, if the outside protectors are roughly handled, they are knocked out of round and will not screw on the pipe. We accordingly request that you have your men handle these protectors gently. Also, wherever possible, screw the female protectors into the male protectors before shipping, as this helps protect the threads on both.

We enclose our Purchase Order herewith, and you can start loading your car immediately if our offer is acceptable. As soon as you have loaded the car, wire or 'phone us the car number and we will immediately give you detailed shipping instructions. When this car is received



and we find it to be satisfactory, we will give you an order to cover the carload which you advise is located in West Texas.]

Very sincerely,

MID VALLEY STEEL CO.,

F. Corgiat,

Purchasing Agent."

[fol. 305] I ask that this be marked Plaintiffs' Exhibit 19.

(The document indicated by counsel was thereupon marked Plaintiffs' Exhibit 19.)

Q. I show you a paper that has been marked Plaintiffs' Exhibit 19, and ask you if that is Mr. Corgiat's signature to that paper.

A. He signed it—that is, it is signed F. Corgiat.

Q. You have printed there, under Mr. Corgiat's name, "Purchasing Agent"? A. Yes.

Q. That is the order for that carload, signed by Mr. Corgiat, is it not? A. It is an order for something.

Mr. Reeder: I offer this Exhibit 19 in evidence.

Mr. Rosenblum: I object to it for the same reasons as the other.

The Court: Overruled.

Mr. Reeder: This is to Fritz Mayer, Kilgore, Texas, dated July 8, 1936 (reading Exhibit 19):

(Plaintiffs' Exhibit 19.)

"Mid-Valley Steel Co.  
2700 South First Street  
St. Louis, Mo.

To Fritz Mayer  
Kilgore, Texas.

Date 7-8-36  
Pur. Ord. No. 4107

Ship to Us—St. Louis, Mo.

Please Enter Following Order. Route Via.....

[fol. 306]

Quantity

Description

1 Carload of Thread protectors in sizes 2" to 16" inclusive

These Must Be Colona Protectors Exclusively, As We Cannot Use Half Coupling Type

Price: \$20.00 Per Net Ton—F.O.B. Shipping Point

Complete Shipping Instructions To Follow As Soon As You Have Given Us The Car Number

Wherever Possible The Male & Female Protectors Are To Be Shipped Screwed Together

Use The Utmost Care In Loading So That The Threads Are Not Battered Or Otherwise Damaged

(Signed) F. CORGIAT  
Purchasing Agent."

The "Purchasing Agent" is part of the printing on the form.

Q. Mr. Fleischman, you had these blanks printed for Mr. Corgiat to sign as Purchasing Agent, did you not?

A. Yes.

Q. This was not a corporation, was it?

A. No, sir.

Q. It was a partnership? A. Yes, sir.

Q. You designated him as the Purchasing Agent, did you not? A. Yes, sir.

Q. He was in fact the Purchasing Agent, wasn't he?

A. I already answered that.

Q. Now I show you another letter dated August 21, 1936, to the Gulf Refining Company, addressed "Att'n: Purchasing Agent" and signed by "F. Corgiat, Purchasing Agent"—

Mr. Rosenblum: May I see it, please?

Mr. Reeder: Yes (handing letter to Mr. Rosenblum).

[fol. 307] Q. Look at this letter and tell the Court whether or not that is Mr. Corgiat's signature.

A. Yes.

Mr. Reeder: I offer this letter in evidence (reading Plaintiffs' Exhibit 20):

(Plaintiffs' Exhibit 20.)

"Saint Louis, Mo.  
August 21, 1936.

Gulf Refining Co.,  
Pittsburgh, Pa.

Att'n: Purchasing Agent or Salvage Div.

Gentlemen:

You will find us the most desirable outlet for your accumulations of Pipe Thread Protectors.

We pay highest market prices and buy All sizes of Colona type from 2" to 16" inclusive. These may be removed from standard, line or drill pipe, or from tubing and casing. Both inside and outside Thread Protectors are acceptable.

We will quote promptly on request and, if a satisfactory arrangement is made, we will, if desired, have our representative assist in gathering and loading of the material.

Write or wire at our expense if you have a carload or more on hand for disposal. We pay Cash In Advance.

Very truly yours,

MID-VALLEY STEEL COMPANY,  
F. CORGIAT,

Purchasing Department."

Q. You said a while ago that one reason why Mr. Corgiat's name was signed as Purchasing Agent was because you gentlemen didn't like to have your names signed to the letters; is that correct?

A. It is not correct. It is not that we didn't like to have our names signed. There was a reason why we didn't want our names signed.

[fol. 308] Q. Did you ever sign any letters?

A. Yes, sir.

Q. I show you a letter which has been marked Plaintiffs' Exhibit 21, and ask you who signed that letter.

A. It is signed by Mr. Cranicer.

Q. That is your partner, isn't it? A. Yes.

Q. That letter is dated January 18, 1939, isn't it?

A. Yes, sir.

Mr. Reeder: I offer that in evidence.

Mr. Rosenblum: May I see it? I can't tell whether I object to it or not. Maybe I want it in.

(After examining letter) This very obviously applies to a different product than was shipped in those cars, and is so remote from the time of this transaction that I object to it for that reason.

Mr. Reeder: It goes with the cross-examination of the witness and the credibility of the witness. It also is admissible for other reasons.

The Court: Let me see it. After examining letter) Very well. Objection overruled.

Mr. Reeder: I offer this in evidence.

The Court: I would like to ask the witness a question. You don't care to say why it was that you had this man held out to the public as Purchasing Agent? You say "for a reason". You wouldn't care to state the reason?

The Witness: I would be very glad to tell you privately, your Honor.

[fol. 309] The Court: You can't tell me anything privately.

Mr. Reeder: I offer this in evidence, being Plaintiffs' Exhibit 21.

Plaintiffs' Exhibit 21, last offered in evidence, is in words and figures as follows, to-wit:

(Plaintiffs' Exhibit 21.)

(Letterhead of Valley Steel Products Co.)

Saint Louis, Mo.  
January 18, 1939.Levinson Iron & Metal Co.,  
Longview, Texas.

Gentlemen:

We are in a position to pay an extremely attractive price at this time for the new style discarded thread protectors. By 'new style' we refer to 8-thread Protectors with the new drill type form of thread. For these we will pay \$45.00 per net ton, f. o. b. shipping point.

In addition, there are also quite a large number of sizes that we can use in the old style protectors. On the attached sheet you will find listed all the sizes of new style protectors that are presently available along with the specific sizes of old style protectors that are acceptable to us at this time. For the old style protectors, we will pay \$25.00 per net ton. Shipments can be made to us in either truckload or carload lots but we prefer carload shipments to be made.

On the basis of \$45.00 per net ton, you can readily appreciate that any new style protectors you are able to secure will bring you a very handsome profit and it will of course pay you to go after them very strongly.

Please let us know as soon as you have a carload ready for shipment so that we can give you shipping instructions.

Yours very truly,

VALLEY STEEL PRODUCTS  
COMPANY,

L. A. Crancer,

General Manager."

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[fol. 310] By Mr. Reeder:

Q. Mr. Crancer signed this letter, did he not?

A. Yes.

Q. Is there any reason why Mr. Crancer would be willing to sign this letter and not sign the others?



Mr. Rosenblum: That is objected to as not having any bearing on this case.

Mr. Reeder: You have a reason for that, have you?

A. Yes, sir.

The Court: Objection overruled.

By Mr. Reeder:

Q. I show you a letter that has been marked Plaintiffs' Exhibit 22, and ask you who signed that letter.

A. Corgiat.

Q. Under his signature are the words "Purchasing Agent", are there not? A. Yes.

Mr. Reeder: I offer this letter in evidence, dated October 7th, 1936,—

Mr. Rosenblum: May I see it, please? (After examining letter) Same objection.

Mr. Reeder: (reading Plaintiffs' Exhibit 22):  
(Plaintiffs' Exhibit 22.)

"October 7th, 1936.

"The David J. Joseph Co.,  
Cincinnati,  
Ohio.

Gentlemen:

If you have any Thread Protectors on hand, we can use them at this time.

For Colona Protectors in sizes 2" to 16" inclusive we [fol. 311] will pay \$40.00 net ton. For half couplings protectors in sizes 2" to 12" inclusive (except 8") we will pay \$30.00 per net ton f. o. b. your city.

Our Purchase Order is attached and, as this offer is for immediate acceptance only, it will be necessary for you to make prompt shipment.

.Kindly advise if you will make a shipment to us.

Very sincerely,

MID VALLEY STEEL CO.  
F. CORGIAT,

Purchasing Agent."

Q. Mr. Fleischman, you took the old type, or V type, and changed them to the new or rounded type, did you not? A. No, sir.

Mr. Rosenblum: That is objected to unless you specify as to when.

The Court: Objection sustained.

By Mr. Reeder:

Q. Have you ever done that?

A. No, sir.

Q. I show you a letter that has been marked Plaintiffs' Exhibit 23, on your stationery: Who signed that letter? A. Corgiat.

Q. With "Purchasing Agent" under it?

A. Yes, sir.

Mr. Reeder: I offer it in evidence. (Reading Plaintiffs' Exhibit 23):

(Plaintiffs' Exhibit 23.)

"Nov. 19, 1936.

Mr. Jay Kornfeld,  
415 Brown Bldg.,  
Wichita, Kans.

Dear Mr. Kornfeld:

[fol. 312] We are attaching hereto our check in the amount of \$299.75 in payment of your invoice of Nov. 17th.

We can use between four and five more truckloads of these protectors at the same price provided you can make shipment within the next three weeks.

If you will be able to ship us four or five more truckloads of protectors in the next three weeks, please advise us.

Very sincerely,

VALLEY STEEL PRODUCTS CO.

F. CORGIAT,

Purchasing Agent."

Q. I show you a letter that has been marked Plaintiffs' Exhibit 24 and ask you who signed that letter.

A. Corgiat, Purchasing Agent.

Mr. Reeder: I offer it in evidence.

Mr. Rosenblum: Let me see it. (After examining letter) This one is dated October 17, 1939. I object to it for the same reason as before.

Mr. Reeder: It is admissible because it contradicts the witness, and goes to his credibility.

The Court: Overruled.

Mr. Reeder: (reading Plaintiffs' Exhibit 24):  
(Plaintiffs' Exhibit 24.)

"October 17, 1939.

Atha Oil Co.,  
Hersee Bldg.,  
Mt. Pleasant, Mich.

Attention: Purchasing Agent.

Gentlemen:

Are you receiving top market prices for your accumulation [fol. 313] of Colona Thread Protectors and Pipe Couplings? The answer is 'No', if you have not been selling to us.

In addition to paying higher prices than others, we give you better service. Our conveniently located field representatives will promptly inspect and load your material and pay you cash on the spot.

You will gain many dollars and considerable time by holding your accumulation of Colona Thread Protectors until you give us an opportunity to quote.

For quickest action, most satisfactory handling and More Money, write or wire for our prices—Today!

Yours very truly,

VALLEY STEEL PRODUCTS CO.,  
F. CORGIAT,

Purchasing Agent.

P. S. We can also use second hand line pipe and casing."

Mr. Rosenblum: I move that that be stricken out, because it doesn't in any way contradict any evidence.

Mr. Reeder: He said he never had field representatives that went out and inspected and helped to load.

The Court: Overruled.

(To the witness) Would the witness like to make an explanation?

The Witness: Yes. My statement was that it was not a general practice of ours.

The Court: I see.

The Witness: Furthermore, up until very recently, that is, within the last year, we never did do it, your Honor, but a lot of companies got into this business and made it a very competitive proposition, so that we were forced to give better service than previously.

[fol. 314] By Mr. Reeder:

Q. These field representatives were not there to protect the seller? A. No, sir.

Q. Were they not there to protect you?

A. To give service, primarily.

Q. They didn't actually handle the goods; they didn't load them with their own hands, did they?

A. Frequently they did.

Q. Did they inspect them?

A. There was no inspection required other than to designate between the different types.

Q. Isn't this a fact: That you were interested in getting the very best thread protectors you could get?

A. No, sir; as an actual fact we were not.

Q. You were not?

A. No, sir; it was only until there was a difference between the type of thread, round thread and V thread, that any inspection of any kind was necessary.

Q. In the fall you paid as high as sixty dollars a ton for thread protectors? A. What?

Q. Have you not paid as high as sixty dollars a ton for thread protectors?

Mr. Rosenblum: That is objected to, unless specific as to time.

The Court: Sustained.

By Mr. Reeder:

Q. Isn't it a fact that in the summer of 1937 you paid as high as forty dollars a ton for thread protectors?

A. I think we did.

Q. And if you got a carload of thread protectors and [fol. 315] paid forty dollars a ton for them, you say you were not interested as to the condition of those thread protectors? A. No, sir.

Q. If you only saved half of them then it would make that carload cost you eighty dollars, wouldn't it?

Mr. Rosenblum: I object to that as calling for a conclusion on the part of the witness.

The Court: What was the question?

Mr. Reeder: If he only was able to recondition half, that would make that half cost eighty dollars.

(To the witness) Isn't that a fact?

The Court: Objection overruled.

A. It made no difference to us what condition the protectors came in, because we applied identically the same remanufacturing process to one as to another.

Q. Did you save and recondition all of them?

A. Yes.

Q. You had no loss, then?

A. Those that were thrown out were, of course, a loss.

Q. What percentage of a carload of thread protectors were thrown out and couldn't be reconditioned?

Mr. Rosenblum: At what time?

Mr. Reeder: At this time.

Mr. Rosenblum: 1937?

Mr. Reeder: Yes.

Q. What percentage were thrown out as being in such condition that you couldn't recondition them?

A. About forty per cent.

Q. About forty per cent.? A. Yes.

[fol. 316] Q. In other words, you reconditioned about sixty per cent. of the protectors? A. Yes, sir.

Q. If you increased that percentage to ninety per cent., by better buying and inspection in the field, you would make more money, would you not? A. Yes.

Q. You still say that you are not interested in what condition the thread protectors are in that your purchase?



A. I wouldn't say we are not interested. We would like to get protectors that are in good condition, but that is in buying—

Q. Why was it that you had your inspectors in the field to look over them?

A. We didn't have, at that time.

Q. Tell the Court why, in these letters, you told the people from whom you bought these protectors that you wished them to use the greatest care in loading them.

A. Because we didn't want them damaged any more than necessary.

Q. And the less the damage the more you were able to recondition out of the car; isn't that right?

A. No, sir.

Q. Mr. Fleischman, you never gave any instructions, in the loading of these thread protectors, to put the good ones on top, did you? A. No, sir.

Q. To pick them out and put the good ones on top?

A. No, sir.

Q. So, if these exhibits 4 and 5 came from the top of [fol. 317] the car and all of the top was like that, that would be a pretty good indication that the rest of the car was like that, wouldn't it? A. If that was a fact, yes.

Q. You say that out of these seven cars that you received, in no one of these cars were over six or seven as good as Exhibits 4 and 5? A. That is right.

Q. Did you see these cars yourself? A. Yes.

Q. And according to that, every one of these inspectors that looked at these seven cars are completely wrong about it? A. Yes, sir.

Mr. Rosenblum: That is objected to as—

The Court: Sustained.

Mr. Reeder: I will withdraw that.

Q. You paid, on an average, in 1937, about forty dollars a ton for thread protectors?

Mr. Rosenblum: I object to that as having no relevancy, what was paid on an average in 1937.

The Court: It may have.

Mr. Rosenblum: On an average, during the year?

The Court: Objection overruled.

A. I think less than that.

By Mr. Reeder:

Q. You think less than that? A. Yes.

Q. You paid as high as forty dollars, is that right?

A. Yes, sir.

Q. The price that you paid for them depended some-  
[fol. 318] what on the market supply and demand; isn't  
that right? A. Yes, sir.

Q. And the competition? A. Yes.

Q. You, of course, bought them as cheap as you could,  
did you, Mr. Fleischman? A. Yes, sir.

Q. You didn't pay any more than you had to pay?

A. No, sir.

Q. And isn't it a fact that you bought them just as  
good as you could? A. Yes, sir.

Q. In none of these cars of thread protectors did you  
tell them to put any scrap pieces, did you?

A. No, sir.

Q. Scrap iron. There was no scrap iron loaded in any  
of these cars, with any of these thread protectors—pieces  
of scrap?

Mr. Rosenblum: There is no showing, and it is not  
based upon any evidence, that there was any scrap iron  
loaded in any of these cars, as separated from these thread  
protectors.

The Court: Read the question.

(Last previous question read to the Court.)

The Court: Objection sustained.

By Mr. Reeder:

Q. Mr. Fleischman, have you your invoices here?

A. No, sir.

Q. Covering the seven cars in question?

A. No, sir.

Q. Have you got them available?

A. I presume we have.

Q. Those invoices will describe this commodity as  
[fol. 319] shipped; will they? I am not asking you what  
they did show, I am asking whether or not the invoices will  
describe the commodity.

A. I presume they will. The customers filled them  
out. We had no control over their description.

Q. The thread protectors that you had to throw aside and couldn't recondition, what disposition did you make of them?

A. They were sold to scrap iron dealers.

Q. And in 1937, what was the market value of such scrap?

A. I would have to consult the trade journal on that. I can't recall.

Q. You testified before the Commission that in 1936 it ranged from eight to eleven dollars?

Mr. Rosenblum: That is objected to as not having any bearing on any issue before this Court.

Mr. Reeder: I am showing in 1936—that was when the hearing was had before the Commission—he so testified at that time.

Mr. Rosenblum: I don't think it makes any difference, in 1936.

The Court: Overruled.

By Mr. Reeder:

Q. Is that correct, Mr. Fleischman?

A. I don't remember, Counsel.

Q. I will ask you if this question and answer will refresh your recollection:

“Q. As to those rejected from time to time, do you know what price they are bringing today?

A. I think they would bring about today, I would have [fol. 320] to make a guess, would be from eight to eleven dollars a ton.”

Mr. Rosenblum: I object to that. It clearly shows that it can not have any bearing on this case, what was the price of scrap iron in 1936.

Mr. Reeder: They say this had no value except for remelting purposes and we are showing it had considerable value, for another purpose.

The Court: He may answer.

Mr. Reeder: What is the price of scrap?

Mr. Rosenblum: The witness has not answered the other question.

By Mr. Reeder:

Q. Did you give that answer before the Commission?

A. If it is in the record I must have.

Q. Have you a recollection now as to whether or not you did? A. No, I don't.

Q. Do you know anything about the price of scrap iron? A. Yes, sir.

Q. In 1937, what was the prevailing market price of scrap iron in St. Louis?

Mr. Rosenblum: There are at least fifteen or twenty designations of scrap iron.

Mr. Reeder: Old broken up thread protecting rings, for remelting purposes.

Mr. Rosenblum: I object to that, because this witness [fol. 321] is not qualified to testify and, in the second place, there happens to be no such designation in scrap. He can't say what the market price was.

The Court: Objection overruled.

Mr. Reeder: Answer the question. What was the prevailing market price—you don't need to be accurate—approximately?

A. The only way that I can be sure of any scrap iron price is to consult the record that shows that every day.

Q. It is within the range of a few dollars, is it not, all the time?

A. I would be making purely a guess and I couldn't—

Mr. Rosenblum: The witness is not called upon to make any guess.

Mr. Reeder: You say you sold it as pieces of scrap, did you? A. Yes, sir.

Q. Do you know what you got for it?

A. No, sir.

Q. Did you get much for it?

Mr. Rosenblum: I object to that as calling for a conclusion, did you get much for it.

The Court: Overruled.

A. I don't remember what we got.

Mr. Reeder: The fact is you only got a few dollars for it, isn't that true?

A. I don't remember.

Q. You are paying regular pipe fitting rates now on a shipment, are you not?

Mr. Rosenblum: That is objected to as wholly immaterial, what he is paying now.

[fol. 322] The Court: Sustained.

Mr. Reeder: Mr. Fleischman, I show you a check, which has been marked as Plaintiffs' Exhibit 25, of the Mid-Valley Steel Company, signed by yourself and Mr. Crancer, on the First National Bank, and payable to the Chicago, Rock Island and Pacific Railroad Company for \$332.82, and marked "Payment Stopped": Do you recall signing that check?

A. If my signature is on it I must have signed it.

Q. Isn't it a fact, Mr. Fleischman, that one of these cars sued on here, particularly in Count 6—that the railroad local office here refused to give you, or to surrender the car to you, until you had paid the pipe fitting rate or the balance, and is it not a fact that you gave them this check for that balance?

A. I don't remember the incident.

Q. Isn't it a fact that after you got back to the office and they gave you the car, you stopped payment on the check? A. I didn't.

Q. You did stop payment on this check? A. I didn't.

Q. Somebody in your organization stopped payment?

A. It shows on the check.

Mr. Reeder: I offer the check in evidence as Plaintiffs' Exhibit No. 25.

Mr. Rosenblum: I object to that. There was no showing on direct examination that this situation existed. I don't know whether it existed or not—

Mr. Reeder: Here is the check (handing check to the [fol. 323] Court).

Mr. Rosenblum: It was not gone into on direct examination at all, and it doesn't tend to prove or disprove any issue here, and there was no testimony on the part of the plaintiffs that that was the situation.



The Court: Objection sustained.

Mr. Reeder: That is all.

Redirect Examination.

By Mr. Rosenblum:

Q. Mr. Fleischman, you don't in any way disavow these letters written by Corgiat? A. No, sir.

Q. You recognize them as having been written with full authority of the partnership? A. Yes.

Q. There is nothing that is contained in any of them that you will now say was not authorized by your partnership?

A. No, sir.

Q. Any statements that were made, with the signature of this man as Purchasing Agent, were made at the time with full authority of the partnership?

A. Yes. I was telling the strict truth about the signatures—they are not Corgiat's actual signature—when the piece of paper was shown me—but they had the full authority and consent of the management. We don't disavow anything in those letters.

Mr. Rosenblum: Your Honor, may we have just a minute or two of recess at this time?

The Court: Yes, you may have a five-minute recess.

[fol. 324] Mr. Bailiff, announce a five-minute recess.

(At this point a brief recess was had.)

Mr. Rosenblum: I don't think I asked you on direct examination a question I intended to ask you.

Do you know when these new type thread protectors with round threads were made first by the Pittsburgh Screw and Bolt Company?

A. Last year, 1939.

Q. In 1939? A. Yes, sir.

Q. Calling your attention to Plaintiffs' Exhibits 13, 14 and 15, that Mr. Perry brought here for Mr. Reeder: Have you examined those exhibits? A. Yes, sir.

Q. Are all three of them the new type or the old type?

A. They are the new type.

Q. All three of them? A. Yes, sir.

Q. I believe he testified that two of them are the old type: Do you know whether that is correct or not?

A. No; they are all the new type.

Q. Have the new type thread protectors today a greater value, when shipped to you, than the old type?

A. Yes.

Q. Do you presently pay a larger sum for the new type, the round type thread protector, than you do for the old type?

A. Yes, sir.

Q. Are they still, even today, sometimes shipped together in carloads? A. Yes.

Q. With reference to what was mentioned in several of these letters as "half coupling type": What kind of thread [fol. 325] protector is the half coupling type?

A. It is a pipe coupling cut in half.

Q. Have they any value? A. No, sir.

Q. Who is Mr. Fritz Mayer to whom one of these letters was addressed in July, 1936?

A. A scrap iron dealer.

Q. When you said in that letter that was read by Mr. Reader, "However, we can not use any of the heavy collar type mentioned in your letter", what was meant by that?

A. That is the half coupling type thread protector, a coupling cut in half.

Q. Is that one of these Colona type cut in half?

A. No, sir.

Q. It is a different type thread protector altogether?

A. Yes, sir.

Q. One that comes in two pieces? A. Yes, sir.

Q. And when manufactured it is manufactured in two pieces; is that right? A. Yes, sir.

Q. In your letter of July, 1936, you say, "We can not use any of the heavy collar type": Did you buy any during that year of the heavy collar type?

A. Not if we could help it.

Q. Were there some shipped among the others?

A. Yes.

Q. Could you say what percentage, in a general way, would consist of that heavy collar type?

A. At that time about every car had about twenty per cent. heavy collar type.

[fol. 326] Q. In 1937, how many heavy collar type would be in the cars that came?

A. Twenty per cent.

Q. So that, of these carloads of thread protectors, the seven cars that are involved in the petition, at least twenty per cent. of those were thread protectors of the half-coupling type? A. Yes, sir.

Mr. Reeder: That is objected to as leading, suggestive and argumentative.

The Court: Overruled.

Mr. Rosenblum: Of this half coupling type, what did you do with them?

A. Sold them to scrap iron dealers.

Q. Calling your attention to Plaintiffs' Exhibit 19, where it is said, "Use the utmost care in loading so that the threads are not battered or otherwise damaged", did the shippers actually do that? A. No, sir.

Q. Calling your attention to Plaintiffs' Exhibit 20, did you, yourself, ever assist, or anyone in your employment, in 1936, in gathering and loading material for the Gulf Refining Company? A. No, sir.

Q. Who was the Levinson Iron and Metal Company of Longview, Texas?

A. A scrap iron dealer.

Q. What kind of a yard did they have?

A. The customary scrap iron yard, out in the open.

Q. When you mentioned "new style" thread protectors in that letter of January 18, 1939, what were you referring to there?

[fol. 327] A. The round thread.

Q. And were these found in scrap as early as January, 1939?

A. They were just beginning to come through.

Q. This letter of October 7, 1936, reads: "For half couplings protectors in sizes 2" to 12" we will pay \$30.00 per net ton f. o. b. your city": Did you buy those at that time?

A. We evidently had a requirement for a special lot at that time.

Q. Who was Mr. Jay Kornfeld of Wichita, Kansas?

A. A scrap iron dealer.

Q. Do you know where his yard is? A. Yes.

Q. Have you ever seen it? A. Yes, sir.

Q. Describe it, briefly.

A. He had quarters with another dealer by the name of D. L. Smith, and it really didn't consist of a yard; it was just a lot.

Q. Were the thread protectors that he shipped in truck loads—did he use to ship them in truck loads?

A. Yes.

Q. Who was the Atha Oil Company of Mt. Pleasant, Michigan: Do you know them?

A. I know them only from having done some business with them.

Q. By way of correspondence? A. Yes.

Q. During the years 1936 and 1937, did you ask for and receive advice from a freight expert by the name of William Rosenbaum, as to what freight rate should be applied [fol. 328] to these shipments? A. Yes.

Mr. Reeder: That is objected to as immaterial to any issue in this case.

The Court: Sustained.

By Mr. Rosenblum:

Q. You testified, if I recall, that you now have a punch press which takes and brings these thread protectors on one of the machines used in bringing these things into round: When did you first initiate that treatment of these protectors, if you recall?

A. In 1937.

Q. In 1936, when these letters were written that have been introduced in evidence, did you have that process?

A. No, sir.

Q. Were you able, with the process that you had then, in 1936, to put these thread protectors in round?

A. No, sir.

Q. Was that one of the reasons why, in these various letters written in 1936, you asked these people to take special care to avoid damaging the threads, and keeping them round?

A. Yes, sir.

Q. Were you able, in 1937, to remanufacture more of the thread protectors, per car, than you could in 1936?

A. Yes, sir.

Q. Did you, from time to time, or did you ever, ship a carload of the ordinary thread protectors which you bought, into your plant from the scrap iron dealers—did you ever ship them to a mill for remelting purposes?

A. Yes, sir.

[fol. 329] Mr. Reeder: That is objected to, and I ask that it be stricken out, unless it is shown that these cars were shipped to a mill for remelting purposes.

The Court: Overruled.

By Mr. Rosenblum:

Q. Did you ever ship a carload of the same type of protector that you got into your plant, to the Pittsburgh Steel Company, of Pennsylvania?

A. Yes, sir.

Q. When was that done?

A. I believe it was in September, 1938.

Q. Were they shipped to them for remelting purposes only? A. Yes, sir.

Mr. Houts: That is objected to, if the Court please. It doesn't create a change of product if they did ship them, for whatever purpose they shipped them—I mean if they are a higher grade product and they shipped them to be remelted, that is just a circumstance.

The Court: I suppose they can show what use was made of the shipment.

Mr. Houts: I was thinking you couldn't get a lower rate just by remelting them. I may be wrong about that.

The Court: Read the question.

(Last previous question and answer read.)

The Court: Objection overruled.

Mr. Rosenblum: I will ask you to mark this as a defendants' exhibit.

(The document indicated by counsel was marked Defendants' Exhibit F.)

Q. Tell the Court what the protectors were that went into this car shipped to the Pittsburgh Steel Company, on the 11th of September, 1938.

A. These were identically the same material as come into our plant right along.

Q. Did the Standard Steel and Rail Company of St. Louis handle that for you as a broker? A. Broker, yes.



Q. What rate was paid on the shipment?

A. Scrap iron.

Q. Was there ever demand made on you for a higher rate or for more money? A. No, sir.

Q. Was there 90,300 pounds of these protectors shipped out? A. Yes, sir.

Q. Can you tell us how you happened to ship this carload?

A. We had a surplus in our plant, in our yard, and we wanted to dispose of it and I told the men to load up the car and ship it to the mill. I got an order through the broker.

Q. Do you know whether these were remelted or not?

A. I didn't see them remelted; they were shipped for that purpose to the mill.

Q. Is that mill in the business of reconditioning thread protectors? A. No, sir.

Q. Was it sold by the Standard Steel and Rail Company, your broker, for remelting purposes only?

A. Yes, sir.

[fol. 331] Q. And so shipped? A. Yes, sir.

Q. No demand was ever made for any larger charge other than the scrap charge? A. No.

Q. And it was shipped upon the scrap iron rate?

A. Yes.

Q. Have you from time to time, over a period of years, shipped this same commodity that was contained in these cars as scrap iron?

A. Yes, sir.

Q. And you have paid the freight on it as scrap iron?

A. Yes, sir.

Mr. Reeder: Just a moment. We object to that. He did it in this instance, but the railroads are required, under penalty of law, to charge the tariff rate fixed. There may be instances where they get by, but it is immaterial to any issue in this case what they have done in the past.

The Court: Objection sustained.

Mr. Rosenblum: I ask leave to introduce into evidence Defendants' Exhibit F.

Defendants' Exhibit F, last offered in evidence, is in words and figures as follows, to-wit:



# DEFENDANTS' EXHIBIT F.

Printed in U.S.A.



To THE PITTSBURGH

154 CCC&STL

E RAILROAD COMPANY DT.

1640 JTS 4 F

NYC 324867

For Cn.

Transported:

MONESSEN, PA., STATION

CONSIGNEE

PITTSBURGH STEEL

DATE

9/11/38

PRO. NO.

T 8609

DESTINATION

MONESSEN PA

ROUTE

CLEVE NYC JCT NYC P&LE

(Please see General No. 100)

Way-Billed From

Way-Bill Date and No.

Full Name of Shipper

Car Initials and No.

6487 CAIRO ILL

8/5/38 58

VALLEY STEEL PRODUCTS CO

NYC 324867

Point and Date of Shipment

Connecting Line Reference

Previous Way-Bill Reference

Original Car Initials and No.

NUMBER OF PACKAGES, ARTICLES AND MARKS

WEIGHT

RATE

FREIGHT

ADVANCES

PREPAID

TO COLLECT

C/L DISCARDED USED PROTECTORS  
HAVING VALUE FOR REMELTING PURPOSES ONLY

90300

762GT

307 18

WT AT ~~XXXXXXXX~~ BELLEFONTAINE OHIO

GROSS 1110

TARE 507

NET 903

DEL 8/10/38

9/45AM

EVANS



TOTAL 307 18

LOCATION

STORAGE RECORD

RECEIVED PAYMENT

BOOK

Notes

Make

Free

Storage Time

Expires

**FREIGHT BILL**  
 MAKE CHECKS PAYABLE TO THE ORDER OF THE P. & L. E. R. R. CO.  
 Original paid freight bills must accompany claims for  
 overcharge, loss or damage.  
 All freight will be subject to demurrage or storage  
 charges or both, as provided in published tariffs.

Q. How much? A. Twenty dollars.

Q. You paid twenty dollars a ton for them?

A. Yes.

Q. And you paid freight charges from the dealer into your place of business? A. Yes, sir.

Q. And then sold them for fifteen dollars a ton; is that correct? A. Yes, sir.

Q. Isn't it a fact that this carload of protectors sold, as described, for remelting purposes, at fifteen dollars, were an accumulation of protectors in your yard that you couldn't recondition?

A. No, sir.

Q. Will you please turn around and tell the Court why you paid twenty dollars for them, paid the freight charges into St. Louis, and then sold them for fifteen dollars?

A. In 1938, in the fall of the year, we accumulated far too many of certain sizes. Certain sizes had become obsolete and were no longer subject to remanufacture and sale. So, we shipped them to the mill for remelting.

Q. This carload were obsolete protectors that you could no longer use for reconditioning and sale?

A. Not because of their condition, but because of their [fol. 335] size.

Q. And because they were obsolete, is that right?

A. As to size.

Q. How long had you been collecting this carload that you shipped and sold for fifteen dollars a ton; over what period of years had they accumulated in your yard?

A. Not a long time. We sold those regularly. That was a current practice with us, to sell and dispose of odd material.

Q. You were in business for making money, weren't you? You weren't in it for your health. A. Yes, sir.

Q. And you were not trying to buy protectors and paying twenty, thirty and forty dollars a ton, and selling them at fifteen dollars?

A. No, sir.

Q. And isn't that the very reason why you inspected them in the field, and assisted in loading them, supervising the loading of them, to see that you got only protectors in good condition, that you could recondition?

A. We didn't do those things.

Q. You didn't do those things? A. No, sir.

Q. I will ask if you have in your employ a man named C. C. Calvert.

A. We do have now and for the past year.

Q. What is his business?

A. His business is to arrange and consummate the purchase of thread protectors.

Q. Do you have a man named N. Perel?

A. Not directly in our employ, no, sir.

Q. What does he do?

A. He is a scrap iron dealer in Houston.

[fol. 336] Q. Does he help you in selecting them and removing them from the oil company to be reshipped to you?

Mr. Rosenblum: Unless you specify the time I think it is not material.

By Mr. Reeder:

Q. Has he ever done that in the past few years?

A. He is a gathering agent. In the past year he gathered material and shipped it to us. Picks it up from various locations and brings it to a certain point.

Q. Mr. Fleischman, you first testified, I believe, that Mr. F. Corgiat was not your Purchasing Agent and later you said he was—I will withdraw that.

Did you have a man in your employ by the name of F. Corgiat?

A. Yes, and anything that he signed for, and anything that his name appears on, was done with our consent.

Q. In 1937, where were your offices?

A. St. Louis.

Q. Where was the office of F. Corgiat?

A. St. Louis.

Q. He was not at Centralia, Illinois?

A. Not in 1937, no, sir.

Q. Where is he now? A. In Centralia.

Q. You said that you bought only from scrap iron dealers, is that right? A. No, sir.

Q. Did you buy directly from oil companies? A. Yes.

Q. These scrap iron dealers from whom you purchased carloads of thread protectors, did they mingle thread protectors with other scrap iron?

A. I don't follow that question, I am afraid.



[fol. 337] Q. You said you visited all their plants: Were the thread protectors mingled with other scrap iron?

A. In some instances, yes.

Q. You were paying from twenty to forty dollars a ton for thread protectors, weren't you?

A. At what time?

Q. In 1937. A. Yes.

Q. What did these dealers get for their other scrap iron, or for their scrap iron?

A. I couldn't tell you that.

Q. You know, don't you, that they didn't get anything like twenty or forty dollars, Mr. Fleischman?

A. I don't know what they got.

Q. Isn't it a fact that these dealers went around and bought up the thread protectors because there was a market for them? A. Yes.

Q. And didn't they handle them separate and apart from scrap iron that they may otherwise have gathered?

A. Not altogether.

Q. Isn't it a fact that they bought them and kept them together and even kept them separated as to sizes?

A. No, sir.

Q. Did you have a written contract with the Gulf Oil Corporation to buy all of their Colona thread protectors?

A. For the year '40 we have.

Q. Did you have in 1939?

A. It was made at the latter part of 1939.

[fol. 338] Mr. Rosenblum: May I ask at this time—

Mr. Reeder: And you agreed to pay \$65.00 a ton for them?

Mr. Rosenblum: I think, out of fairness to this witness and the Court, counsel ought to be asked at this time how he happens to have in his possession letters and documents that were addressed to third parties from this defendant.

Mr. Reeder: What difference does it make?

Mr. Rosenblum: I believe it is a clear case of conspiracy between these railroads and the Pittsburgh Screw and Bolt Company, to go around the country and grab up contracts that these people have made.

Mr. Reeder: The papers are here, the original letters that these gentlemen admit sending. But for these letters we would not have had the facts.

Mr. Rosenblum: Here is the manufacturer of the thread protectors in court. He is sitting back there now, Mr. Perry. He has been in court during the entire time of this trial. He has given his testimony in this case, and here we find, in some mysterious way, without any subpoena duces tecum ever having been issued for any party in this case, or any third person in this case, we find what at least appears to be a confidential communication, and copies of contracts between third parties and this defendant.

[fol. 339] I submit, it is a wholly unfair and unreasonable process.

I would like to have the Court ask counsel where they got these papers and how they got them.

Mr. Reeder:.. We not only have these but a great many more.

Mr. Rosenblum: It is very obvious that they attempted to get all sorts of correspondence to pin something on this defendant, and it has been done by the connivance of this manufacturer of these articles new. This man is in court and he is conferring and conniving with these attorneys.

✓ I object to it. I don't think they have any right to go around this country and pick up documents that contain confidential business relations between defendant and other parties, and then ask this witness about it.

The Court: Proceed.

Mr. Reeder: Now, let me show you a letter, Plaintiffs' Exhibit 26, and ask you if that is not a copy of a contract dated October 17, 1939, with the Gulf Oil Corporation.

Mr. Rosenblum: I object to it on the ground that it has no bearing on any issue in this case.

The Court: Let me see that (examining Plaintiffs' Exhibit 26).

Mr. Reeder: I think it goes to the credibility of this witness, if the Court please. He started out by denying

[fol. 340] certain matters that are shown by these letters, otherwise, and I think at least it goes to his credibility as a witness. In other words, taking one position, that he buys only from scrap iron dealers—

Mr. Rosenblum: This took place in October, 1939.

The Court: What is the date of this letter?

Mr. Rosenblum: October, 1939. These shipments moved in July and August, 1937.

The Court: Objection sustained.

Mr. Reeder: In every one of these letters that was written, from 1936 on, you constantly reminded these people from whom you bought protectors that you could only use Colona protectors?

Mr. Rosenblum: That is objected to. The letters are the best evidence.

Mr. Reeder: The letters have been read. Instead of rereading them I am asking him if it is not a fact that they told the shippers all the time that they couldn't use anything but Colona.

The Court: Overruled. He may answer.

By Mr. Reeder:

Q. Sizes 2" to 16", isn't that correct?

A. Yes.

Q. You also told them from time to time that you couldn't use this heavy collar type; isn't that right?

A. Yes, sir.

Q. In answer to Mr. Rosenblum's question you said [fol. 341] that in these seven cars there were twenty per cent. of the heavy collar type? A. Yes, sir.

Q. Did you unload those cars? A. No, sir.

Q. Did you keep any record of what was in and what was not in those cars?

A. A receiving report was rendered in connection with each car.

Q. Have you got a report showing how many, and of what weight, heavy collar type protectors were in this car?

A. We did have at one time.

Q. Where is it today?

A. If we have it at all it is in our office.

Q. You didn't bring it to court with you to substantiate your statement that twenty per cent. were in the car, did you? A. No, sir.

Mr. Reeder: That is all.

Redirect Examination.

By Mr. Rosenblum:

Q. No one asked you to bring it to court, did they?

A. No, sir.

Q. Did you and your partner file with the Interstate Commerce Commission the complaint, which I offered in evidence, and which is attached to our Motion and Plea in Abatement in this case? A. Yes, sir.

Mr. Houts: That is objected to as not bearing upon any issue here.

The Court: Read the question.

[fol. 342] (Last previous question read to the Court.)

The Court: Objection sustained.

(Here ensued discussion off the record.)

Mr. Rosenblum: I offer in evidence Defendants' Exhibit G, and offer to show that, assuming the objection is made and your Honor sustains it, that this case pending before the Interstate Commerce Commission, No. 28215, is set for hearing by the Commission on February 29, 1940, at the County Court House, Cairo, Illinois. We offer that proof for the reason given.

The Court: Objection sustained.

Mr. Rosenblum: I think that is all, Mr. Fleischman.

Mr. Reeder: That is all.

Mr. Rosenblum: Step down.

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[fol. 343] PAUL OLIVER, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the defendants as follows:

## Direct Examination.

By Mr. Rosenblum:

Q. State your name. A. Paul Oliver.

Q. Where do you live, Mr. Oliver?

A. 3517 Connecticut, St. Louis, Missouri.

Q. By whom are you employed?

A. Valley Steel Products.

Q. How long have you been employed by them?

A. Ten years.

Q. How old are you? A. Twenty-seven.

Q. What are your duties, or what were your duties during 1937?

A. I was foreman of unloading cars.

Q. As part of your duties was it your duty to examine the material that came in? A. Yes, sir.

Q. And check it? A. Yes.

Q. Did you have occasion to unload the cars that contained the thread protectors?

A. Yes, I helped right along with the work.

Q. You actually helped with the physical work?

A. Yes, sir.

Q. Where were they unloaded, were they thrown to the ground?

A. Yes; thrown right off on the ground.

Q. Were they separated as to sizes?

A. That is right.

Q. Was any effort made at the time a car was unloaded [fol. 344] to separate the thread protectors in any way other than sizes? To make the question a little more clear: Mr. Fleischman testified that they were separated at some time and those which could not be remanufactured were discarded. A. That is right.

Q. Was that done at the time of unloading? A. Yes.

Q. Where were they put in the yard in 1937, that kind that couldn't be remanufactured?

A. Well, we just had a separate pile of them.

Q. I show you Defendants' Exhibit D: You have had an opportunity to examine it heretofore, in court?

A. That is right.

Q. I ask you to state whether Defendants' Exhibit D represents a type of thread protector, as to quality, which came in the seven cars in question.



A. That is what we call a thread protector that comes in our yard. That is an average; some are worse and some are better.

Q. Do you have an opportunity of knowing what cars come in the yard—over what railroad they are shipped?

A. No, I don't, but I did have in 1937. I had been instructed on all the Rock Island cars to look in them and see what are in them.

Q. And did you do that? A. Yes, sir.

[fol. 345] Q. Would you say that this Exhibit D is what you call an average protector? A. Yes, sir.

Q. Is this the average type protector that is remanufactured by your company?

A. That is right.

Q. The company you work for? A. Yes, sir.

Q. Now showing you Defendants' Exhibit B, I will ask you to state whether, in your opinion, that can be reconditioned.

Mr. Reeder: That is objected to. He has not qualified.

Mr. Rosenblum: I will qualify him.

Q. Have you worked in the plant itself?

A. Yes, sir.

Q. Have you actually done various things that Mr. Fleischman here described as having been done in the process of remanufacturing?

A. I did all of them.

Q. Were you at that time actually engaged in pointing out what thread protectors could be remanufactured and what couldn't?

A. Yes, sir.

Q. Tell us if that one could be. A. No, sir.

The Court: Let me see that (examining exhibit). Q

Mr. Reeder: What is that exhibit number?

Mr. Rosenblum: B.

Q. Tell us why.

A. It is too corroded. The threads are too bad. It is too deep inside of the material.

Q. The corrosion is too deep inside of the material?

A. Yes.

Q. Could you say, as to these cars that came in over the Rock Island, whether they contained other than the Colona type thread protectors?

[fol. 346] A. Most all the cars we get, they all have some half couplings protectors in, what we call half couplers.

Q. I show you these exhibits that have been marked Plaintiffs' Exhibits 4 and 5: The testimony of the men from the Western Weighing and Inspection Bureau, who identified them, was that these were representative thread protectors of those contained in the cars. I will ask you, taking first Exhibit No. 4, to state whether this was the average thread protector that came in the cars.

A. I would say not.

Q. Why not?

A. You find very few like this in any car; one or two, or maybe a half dozen at the most.

Q. What is the condition of that thread protector that you have in your hand now, Plaintiffs' Exhibit 4?

A. It is practically a new one.

Q. Calling your attention to Plaintiffs' Exhibit No. 5, which consists of some more thread protectors that were identified as being samples from some of these cars—

A. I would say about them, about the same way.

Q. Would you say that that was a fair representation of what was contained in those cars? A. No, sir.

Q. Why not?

A. Well, they are just too good to be in thread protector cars.

Q. How many would you find in an ordinary car of thread protectors looking like Exhibit 5, that you got in [fol. 347] 1937, in the summer?

A. There would not be much more than a half dozen or a dozen in each car.

Q. Do you know whether or not any thread protector which is sold by the defendants ever is sold by them to the mills without undergoing the reconditioning or remanufacturing process that Mr. Fleischman described?

A. No, sir.

Q. State whether or not it is true that, as to every thread protector which is sold in the remanufactured condition, that such thread protector goes through the process that Mr. Fleischman described.

A. Yes, every one.

Q. Were any of the thread protectors which came in these cars fit to be used in their then condition, for the purpose for which they are originally intended?

A. What was it?

Q. Were any of the thread protectors which came in these cars to you, fit to be used in their then condition for the purpose for which they are originally intended, even such ones as Exhibits 4 and 5?

A. Oh, no; we couldn't use those; we couldn't send them out.

Q. They would have to be reconditioned?

A. That is right.

Q. And tested? A. That is right.

Q. Such as Mr. Fleischman described?

A. Yes, sir.

Mr. Rosenblum: You may inquire.

#### Cross-Examination.

By Mr. Reeder:

Q. Mr. Oliver, you said that Exhibits 4 and 5 are too good to be among them; is that right?

[fol. 348] A. There is a few in there, but you wouldn't find many.

Q. What did you mean when you told the Court that Exhibits 4 and 5, the protectors, were too good to be among those protectors?

A. I mean, there are not very many of them that comes in the cars.

Q. Is that what you really mean?

A. That is right.

Q. These thread protectors, Exhibits 4 and 5, have been used, have they not?

A. I don't know; they might have not.

Q. Can you tell? You are offering yourself as an expert. Can't you tell whether or not they have been used?

A. No; you can't tell.

Q. You can't tell now whether Exhibits 4 and 5 have once been used or not; is that right?

A. That is right.

Q. You say you don't get in these cars any protectors in as good condition as Exhibits 4 and 5?

A. That is right.

Mr. Rosenblum: He didn't say "any"; he said "few".

Mr. Reeder: Let the witness answer.

Mr. Rosenblum: Don't ask an unfair question.

The Court: I don't think that was quite fair.

Mr. Reeder: I will withdraw it then.

Q. Look at these exhibits again and tell the Court whether you know they have been used once, or not.

Mr. Rosenblum: That is repetition. He said no one could tell.

Mr. Reeder: Is that what you mean, you can't tell?  
[fol. 349] A. I can't, and no one else can.

Q. If you can't tell whether or not they have been used, can you tell us whether or not they are good enough now to be used?

A. No—you can't sell them. They might have been new ones and rolled around in the dirt. You would have to take that dirt off.

Q. Is there anything wrong with them besides dirt?

A. You can't tell. They would have to be gauged first.

Q. In the shipments of cars that you receive, are the male and female screwed together? A. No.

Q. Never? A. No, sir.

Q. You have heard all these letters read stating that must be done, haven't you?

A. I never heard them letters. I was not here when the letters were read.

Q. You say they don't come in in this condition, screwed together?

A. Very seldom.

Q. Did you ever see any come in screwed together?

A. There might be some come in screwed together.

Q. What percentage of them come in screwed together?

A. Well, I couldn't tell the exact percentage. I would say ten per cent., probably, in some shipments; in some there is not any, and ten per cent. is about the most.

Q. Ten per cent. is about the most?

A. Yes, sir.

Q. You say this is about the way they come in?

A. That is the average.

[fol. 350] Q. Don't you know that this protector has not been in use for years? A. That is right.

Q. Isn't that a fact, that this protector, Defendants' Exhibit D, has not been in general use for several years?

A. Several years?

Q. Yes, several years; isn't that a fact?

A. Yes, sir.

Q. Will you tell the Court that there was one single protector of this type in this Rock Island shipment? Look around and tell this Court whether or not you could say there was one protector like this in that shipment.

A. Yes; there was more than one.

Q. You think there were more than one?

A. Yes, sir.

Q. You said that you had instructions to examine carefully the Rock Island shipments?

A. That is right.

Q. Did you have instructions to examine carefully the Missouri Pacific shipments?

A. No, sir. We—I always have instructions to examine every shipment that comes in.

Q. You said you had especially paid attention to the Rock Island shipment?

A. That is right.

Q. Did you have instructions to pay attention to the Missouri Pacific shipment?

A. No, sir.

Q. Were you instructed to pay special attention to the M. & O. shipment?

A. Not at that time, not in 1937.

Q. Or any other railroad?

A. Not at that time.

Q. At what time? A. 1937.

Q. You unloaded seven cars—there were seven cars, [fol. 351] were there not?

A. That I do not know.

Q. In the summer of 1937?

A. I don't know how many there were.

Q. Do you remember the car numbers?

A. No, sir.

Q. Do you remember the days on which you unloaded these shipments?

A. Not entirely the days. I remember around in July and August and June.



Q. Did you make any record of this material?

A. No, sir.

Q. Did you take the protectors that you concluded couldn't be reconditioned and lay them aside and count them?

A. Yes, sir.

Q. Did you make a record of them? A. No, sir.

Q. You made no record of them? A. No, sir.

Q. You weighed them? A. We—

Q. Bear in mind what I am asking you.

A. No, sir.

Mr. Rosenblum: Let him answer. You fuss at him before he opens his mouth.

Mr. Reeder: Did you not a moment ago say that you separated the good from the bad and those that you couldn't recondition you weighed them?

A. No, sir.

Q. You didn't say that a while ago?

A. No, sir.

Q. And you didn't say that you counted them, did you?

A. No, we didn't count them.

(One of the previous questions and answers was thereupon read to the witness as follows:

“Q. Did you take the protectors that you concluded [fol. 352] couldn't be reconditioned and lay them aside and count them? A. Yes.”)

Q. You said you counted them. Then I asked you, did you make a record of it and you said no; isn't that right?

A. Yes, sir.

Q. Did you count them?

A. No, we didn't count them.

Q. Why did you say a moment ago that you did count them?

A. You said laid them aside and counted them. I laid them aside, but I didn't count them.

Q. That is your answer, is it? A. That is right.

Q. You were trying to find out what percentage were good and what percentage were bad, weren't you?

A. No. We sort them out. The ones that are good we send them through; the ones that are bad we keep them out separate.

Q. You were told by your superior officer to pay particular attention to the condition of the thread protectors in the Rock Island cars?

A. That is right.

Q. Why were you paying particular attention to the condition of those protectors? A. Why?

Q. Yes.

A. I don't know. He told me. I gave him a record, what came in these cars, what was in them.

Q. What did you give him?

A. I told him they were an average run of protectors.

Q. Did you tell him how many were good and how many bad? A. No.

Q. How many were usable and how many were not usable? A. No.

[fol. 353] Q. Did you tell him how many of one size and how many of another size? A. Yes, sir.

Q. Did you make any record at all? A. No, sir.

Q. All you did was to tell him whether it was an average run of protectors? A. That is right.

Q. That it was an average run?

A. What we call an average run.

Q. Were you expecting to get something far higher than the average run?

A. I was not, no.

Q. What were you expecting?

A. I was not expecting anything.

Q. Why were you doing all this?

A. I had instructions to do it.

Q. Did they tell you why they wanted to know?

A. No, sir.

Q. But the fact is that you didn't separate them?

A. Didn't separate them? We separated—we always do that. Every car that comes in we separate the bad material from the good material.

Q. And taking these seven cars, how much bad material did you have and how much good material did you have?

A. It is an average run of protectors.

Q. We don't know anything about that and don't know what you mean by an average run. I ask you how much, in any way you describe it, in pounds or in numbers—how much bad did you have and how much good did you have in the first car?

A. What do you mean by "good"?

[fol. 354] Q. I mean the ones that you said—that you concluded could be reconditioned as good, and as bad, I mean the ones that you stated you concluded couldn't be reconditioned.

A. About thirty per cent, we couldn't recondition.

Q. That was in the first car?

A. The first car—that is the average of all the cars, of thirty per cent.

Q. Thirty per cent. couldn't be reconditioned?

A. That is right.

Q. What did you do with the thirty per cent, that couldn't be reconditioned?

A. We just have to sell them for scrap iron.

Q. I asked you what did you do with them?

A. What did we do with them?

Q. Yes.

A. We just put them on the side and waited for the scrap iron truck.

Q. How long did you wait?

A. I don't know. I don't remember how long we waited.

Q. How much did you sell them for?

A. I don't know how much they sold them for.

Q. Did you have anything to do with that?

A. No, sir.

Q. But you didn't make any record of any matter concerning any one of these seven cars, as to the percentage or number or weight of thread protectors that couldn't be reconditioned and the number that could be reconditioned?

[fol. 355] Mr. Rosenblum: I object to that as repetition.

The Court: It is cross-examination.

A. No, sir.

By Mr. Reeder:

Q. You say that in these cars, these seven cars, you didn't find in any one of the cars more than six or seven protectors like Plaintiffs' Exhibits 4 and 5; is that right?

A. That is right.

Q. Were they all on top, of this type that you found?

A. All on top?

Q. You said there were six or seven; Were those six or seven in each car on top of the car?

A. Did I say six or seven in each car?

Q. I thought you said that. Did you mean that?

A. I said you won't find six or seven in any protector cars that come in.

Q. You mean, six or seven in the seven cars?

A. Probably there was not any in all cars. I said an average car of protectors that comes in you won't find no more than six or seven in the cars.

Q. They ship—

The Court: This witness has not made himself plain.

(To the witness) You mean that you would find six or seven in one car, or six or seven in a half-dozen cars?

The Witness: No; an average run. Some protectors you won't find—in some earloads you won't find any. In some cars you will find six or seven.

[fol. 356]. The Court: In one car?

The Witness: That is right.

The Court: Do you remember how many were in these cars?

The Witness: I haven't seen any of those in the cars.

By Mr. Reeder:

Q. You didn't see any protectors like Exhibits 4 and 5 in the seven Rock Island cars?

A. No, sir; I haven't seen any of those. If there was a great many of them, this type, I would pay particular attention to them, because that is my job, but if there was only four or five or six I wouldn't even notice them. When there is a lot I will pay particular attention to them.

Q. Why did you not make a record of what you saw in these cars—

A. I told Mr. Crancer, who is my other boss—I told him exactly what came in the car. I do that all the time, every car that comes in.

Q. How many cars do you supervise unloading in a year? A. How many cars?

Q. Yes, in a year.

Mr. Rosenblum: I think that probably varies from year to year.

Mr. Reeder: Let us see if it does.

Q. On an average, how many cars do you receive and supervise the unloading of in a year?

A. Oh, approximately seventy-five or a hundred.

[fol. 357] Q. Approximately seventy-five or a hundred. Do you go to Mr. Crancer and report to him after the unloading of every car?

A. That is right.

Q. Does he make any record of what your report is of that car? A. I do not know.

Q. Have you ever seen such a record? A. No, sir.

Q. This is 1940, and you can remember back, without any records, as to what was in and what was not in these particular cars?

A. Yes, because I was instructed to. Whenever I have instructions to do that I usually remember.

Q. You were having trouble with all the railroads at that time? A. I do not know.

Q. Were not all the railroads demanding the pipe fitting rate on thread protectors at the same time?

Mr. Rosenblum: That is objected to. It is not in this case.

The Court: Sustained.

Mr. Reeder: He instructed you to pay particular attention to the Rock Island and didn't instruct you to pay particular attention to the cars received from other railroads?

Mr. Rosenblum: I object to that, because it is not material here.

Mr. Reeder: Now, after the lapse of three years, and examining seventy-five cars a year, supervising and un-[fol. 358] loading them, without any record kept at the time, you can go back and remember the condition of the thread protectors that were in these particular seven cars?

Mr. Rosenblum: That is an argument and not a question.

Mr. Reeder: He has answered. It is cross-examination.

The Court: Read the question.

(Last previous question read.)

The Court: Objection overruled.

Mr. Reeder: I think you answered it "yes".

That is all.



### Redirect Examination.

By Mr. Rosenblum:

Q. Did you ever get a carload of thread protectors that were like Exhibits 4 and 5 in your life?

A. No, sir.

Mr. Rosenblum: That is all.

Mr. Reeder: No further questions.

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Mr. Rosenblum: We have two other witnesses, but neither of them is available this afternoon. I think this witness will probably take much more than twenty minutes. Will that be all right with your Honor?

The Court: How do you mean, will it be all right? I have another case for tomorrow morning.

[fol. 359] Mr. Rosenblum: We have had these witnesses on call so long, and the other two witnesses probably won't take more than a half or three-quarters of an hour.

The Court: When are you going to have them here?

Mr. Rosenblum: Any time tomorrow.

The Court: I have another case set for trial tomorrow.

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RAY WILLIAMS, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the defendants, as follows:

### Direct Examination.

By Mr. Rosenblum:

Q. State your name, please, sir.

A. Ray Williams.

Q. Where do you come from?

A. Cairo, Illinois.

Q. What do you do at Cairo at present?

A. I am secretary and traffic manager of the Cairo Association of Commerce and traffic manager of the Cairo Board of Trade.

Q. Tell the Court your experience in connection with railroad traffic, please.

A. Well, starting about in 1904, I worked successively, three years each, with the Illinois Central Railroad and the Chicago and Eastern Illinois Railroad.

Q. In what capacity?

[fol. 360] A. As rate clerk and bill clerk and cashier, handling rates and rating shipments.

Q. And thereafter?

A. In about 1913, I was traffic manager with the Baker-Matthews Lumber Company at Sikeston, Missouri, and in 1915 I became traffic manager for the Cairo Association of Commerce at Cairo, handling all rate and transportation matters for the City of Cairo and the shippers and receivers of freight thereat.

Q. During the war did you have any capacity in the Railroad Administration?

A. During the period of Federal Control I was selected by the National Industrial Traffic League and appointed by the Attorney General of Railroads to serve on one of the committees of the Railroad Administration that made freight rates and passed upon freight rate applications.

Q. Have you presented matters before the Commission, in connection with hearings before the Commission, with reference to freight rates and freight tariffs?

A. Yes, during the past twenty-five years.

Q. Have you examined the freight rates with reference to the shipments that have been described in the evidence?

A. I have examined the ratings, and so forth.

Q. The ratings and classifications that are applicable to these shipments? A. That is true, yes.

Q. Have you had any connection with these defendants, so far as the plant which they have located at Cairo [fol. 361] is concerned?

A. Beginning in 1937, I started my connections with the Valley Steel, Mr. Fleischman and Mr. Crancer, starting back in about July, '37, and I have acquainted myself with their operations.

Q. Have you seen their plant and the operation which is conducted in their plant which Mr. Fleischman described this morning? A. Yes.

Q. Are you thoroughly familiar with it? That is a conclusion, of course, but you have actually been in the plant and watched these things come into the plant, at Cairo and St. Louis?

A. I have, and I have taken a number of other people through and showed them the operation, so that they might see what was going on.

Q. In St. Louis and Cairo?

A. Only at Cairo, but I have been through the plant at St. Louis.

Q. As it existed in July and August, 1937?

A. In July, '37.

Q. Just what have you actually done for these defendants in the way of any assistance or help that you might have rendered to them in any connection during that time, from that time to the present time?

A. Well, as relates to rate and transportation matters, I assume you mean?

Q. Yes.

A. Well, I have taken over the handling of all their rate and transportation matters.

[fol. 362] Q. Are you in a general way acquainted with the matter, the substance and contents of this particular lawsuit; have you read the petition and checked the freight rates sought to be recovered therein? A. I have.

Q. As to Counts 5 and 7, originating from Lake Charles, Louisiana and Rodessa, Louisiana, so as to make it clear to the Court, I think that it has been testified by the rate witness for the plaintiffs that a rate is applicable on what they designated as the iron pipe fittings rate of 37½ per cent of first-class. Was that his testimony, just by way of preliminary? A. The rate—

Mr. Houts: What was your question?

Mr. Rosenblum: I am asking if the rate that your witness testified to was the equivalent of 37½ per cent of first-class. That is just to get at the point that I want to make here.

Mr. Reeder: I don't think this witness can testify as to what some other witness testified.

Mr. Rosenblum: It is purely preliminary.

Mr. Reeder: I have no objection to it if Mr. Tharp—

(To Mr. Tharp) Is that right?

Mr. Tharp: That is correct.

By Mr. Rosenblum:

Q. There was the rate 37½ per cent of first-class, which [fol. 363] he said was the applicable iron pipe fitting rate for shipments of materials from Lake Charles?

A. Fifth-class rate.

Q. Which is equivalent to 37½ percent. of the first-class rate? A. That is correct.

Q. Have you examined the rate structure and tariffs that are applicable to the movement of pipe fittings, including iron pipe thread protectors, from Lake Charles, Louisiana and Rodessa, Louisiana, to St. Louis?

A. I have.

Q. Will you tell the Court what, in your opinion, is the proper applicable rate on iron pipe thread protecting rings, from those localities to St. Louis?

Mr. Houts: That calls for a conclusion of the witness. He can read from any tariff that he wants to read from.

The Court: Objection sustained.

Mr. Rosenblum: Let us accommodate ourselves to the objection and read from the tariff which you say is applicable.

Mr. Houts: I object to that question, if the Court please. We object to that question as calling for a conclusion of the witness. You can ask him—

The Court: Objection sustained as to that.

Mr. Rosenblum: May I refresh your recollection, that the witness for them was asked that very same question and answered it?

Mr. Houts: I think not.

[fol. 364] Mr. Rosenblum: I heard it. He was asked, and he read it out of the book. I am asking this witness the same thing. I think his answer is going to be different.

Mr. Reeder: If you put me on the witness-stand and ask, my conclusion would not be of much value. He is asking for a conclusion as to which is applicable. I think he has to prove it by the book itself.

The Court: Objection sustained.

Mr. Rosenblum: Point out in the freight tariffs, if you can, the rate on so-called pipe fittings, and included in that designation, thread protectors, iron, from Lake Charles, Louisiana and Rodessa, Louisiana. Can you do that, Mr. Williams? Tell us where it appears, what tariff, and so forth.

A. There are rates in two tariffs. The same rate in each of the two tariffs—

Mr. Houts: I can't hear you, Mr. Williams.

The Witness: Agent Peel's I. C. C. 2888, Item 2440, Section 2, iron and steel articles, as follows: "Pipe, steel or wrought iron, welded or seamless, rating class 32-1/2. Pipe connections, couplings and fittings, iron or steel (other than cast iron or steel), not plated, or steel body, not plated (See Note 1)."

Class 32-1/2 (Note 1). "When under three inches in diameter, connections, couplings and fittings must be packed in boxes, barrels, kegs, casks or bags, or strung on wire."

By Mr. Rosenblum:

Q: Is there any other tariff that you want to read, Mr. Williams, in answer to the question?

A. The 32-1/2 rating from Lake Charles, Louisiana. That is the tariff that establishes the rating from Lake Charles and Rodessa, Louisiana.

Q. What does that amount to in dollars and cents?

A. From Lake Charles it amounts to 62 cents per 100 pounds, and from Rodessa, 55 cents per 100 pounds.

Q. Have you calculated what the total charge would be on Count 5, which is the shipment from Lake Charles, Louisiana, at the rate that you have just given, considering the number of pounds that were in that particular car? A. Yes.

Mr. Reeder: Just a moment. We want to raise an objection to this, because in the tariff that he has read from it provides that that rate applies only to mixed carloads.

"In mixed carloads with articles named in Item 2400 or with articles described in Item 2450, provided that the combined weight"—pipe connections, couplings and fittings does not exceed 33-1/3 per cent. of the carload.

In Article 2400 it describes those various articles that may be mixed in the car.



In this connection, there is no testimony that any of these other articles were in this car. These were all [fol. 366] thread protecting rings.

Your Honor, this tariff couldn't apply, as our witness, Mr. Tharp, explained to the Court at the time.

Mr. Rosenblum: That is a question for cross-examination.

Mr. Reeder: No; it is a matter for objection.

The Court: Read the question.

(Last previous question and answer read to the Court.)

Mr. Rosenblum: Whether or not this particular tariff applies is for this expert to say, and if it doesn't apply and there is something in the tariff that would make it inapplicable, that can be brought out in cross-examination.

I haven't asked any other question yet. I asked him could he calculate it and he said, yes, he could.

The Court: He answered, "Yes".

(Here ensued private colloquy between the Court and Mr. Rosenblum.)

The Court: He may answer.

Mr. Reeder: My objection goes further, because the witness only read a part of the item and didn't read it in its entirety. The part that he omitted reading excludes the testimony, because that is the part that I have read.

Mr. Rosenblum: If we want to go into that at this time and the witness will testify that it doesn't exclude it and this is the applicable tariff, the portion he has not read he has not read because—

[fol. 367] Mr. Reeder: The point I make is this: This is a written instrument for the Court to interpret and not for the witness. If your testimony brings you within the definition, then the tariff applies. The witness read down to this point, "in mixed carloads".

There are a lot of articles named in Item 2400, none of which were in this car. But if those articles were in this car, and if the thread protectors did not constitute more than  $33\frac{1}{3}$  per cent. of this car, then it says this rate

would apply; otherwise not. He is trying to apply a rate where the evidence doesn't—

Mr. Rosenblum: This is purely argument on our part now, as this witness will testify that particular portion is a separate portion and relates to exactly what it says. The first portion he read relates exactly to what it says. There is more than one subject-matter in that tariff. The witness will so testify.

The Court: Go ahead.

Mr. Rosenblum: He may answer my question?

The Court: Yes.

Mr. Reeder: We except.

A. The freight charges on Rodessa, Louisiana—

By Mr. Rosenblum:

Q. I asked first for Lake Charles, Louisiana, please.

A. Lake Charles, Louisiana, at a rate of 62 cents for 100 pounds, would represent \$520.18 freight charges.

[fol. 368] Q. And from Rodessa, Louisiana?

A. At a rate of 55 cents, it would represent \$308.55.

Q. And that is the rate that is designated for pipe thread protectors, iron; is that correct?

Mr. Houts: We object to that, because the tariff speaks for itself. He has read it.

Mr. Rosenblum: I will withdraw that.

A. That is the rate that applies on thread protectors—

The Court: Objection sustained.

Mr. Rosenblum: Now, I call your attention, Mr. Williams, to the rate concerning which there was testimony, and description concerning which there was testimony, in Consolidated Freight Classification No. 11—excuse me.

I will ask that this be marked as Defendants' Exhibit H.

(The document indicated by counsel was marked Defendants' Exhibit H.)

Mr. Rosenblum: I call your attention, Mr. Williams, to page 291 of Consolidated Freight Classification No. 11, which has the heading of "Pipe Fittings", as it appears on that page 291 and page 292. First, I will ask you if this Consolidated Freight Classification No. 11 was in effect

during the year, or during the summer of 1937, as far as the shipments are concerned that were mentioned in plaintiffs' evidence.

Mr. Reeder: We will admit that it was.

Mr. Rosenblum: Calling your attention to what appears under the heading "Pipe Fittings" and specifically [fol. 369] to what appears as "Rings, thread protecting, iron, in packages", and calling your attention, further, to Rule 25—maybe you can find it quicker than I can.

(Witness locates page in classification.)

Calling your attention, also, to Rule 25, which reads: "Iron versus Steel Unless the contrary appears, the word 'iron' wherever used in this classification includes, also, steel; and vice versa."

I will ask you to state as an expert whether or not this tariff mentioned on page 291, "pipe fittings, rings, thread protecting, iron, in packages," applies to the shipments that were made in these cars over the Rock Island.

Mr. Reeder: That is objected to as asking for a construction of the tariff. The language is plain, and that is for the Court and not for the witness.

The Court: He may answer:

A. The item which says "Rings, thread protecting, iron", would not be applicable to the shipments in question.

By Mr. Rosenblum:

Q. Now, will you tell the Court why?

A. Because, first, the shipment consisted of a steel product and, second, because there were specific commodity rates in effect, which removed the application of the classification rating.

Q. From your observation of the data that appears on page 291, will you say that the contrary appears, as [fol. 370] specified in Rule 25?

A. I would not say that the contrary—

Q. Does the contrary appear, in accordance with Rule 25, pointing out the other items under that listed as iron or steel? A. It does not.

Q. I beg your pardon? A. It does not.

Q. Are you able to say, from having heard the testimony in these cases, and from your knowledge of the article involved, whether these items here that were shipped in these cars had any commercial value other than for remelting purposes?

Mr. Reeder: That is objected to, because he is asking this witness for a conclusion. The question is susceptible of proof, without resorting to the conclusion and opinion of the witness.

Mr. Rosenblum: Perhaps I ought to qualify him—

Mr. Reeder: It is not a question for expert testimony. We have shown, and the defendants have admitted by their testimony, that it does have a value. It was not purchased for remelting purposes. It has a value for its original purpose when reconditioned.

Mr. Rosenblum: There is no such admission, and the testimony doesn't show it.

The Court: Objection sustained.

Mr. Rosenblum: May I proceed to qualify him further, or does your Honor think that qualification will be of no help?

The Court: I think not.

[fol. 371] By Mr. Rosenblum:

Q. Have you ever seen a carload of these thread protectors, such as have been described by the witnesses Oliver and Fleischman; have you ever seen such a carload? A. Yes.

Q. Do you know whether such thread protectors have any value other than for remelting purposes?

Mr. Reeder: He is asking the same question. I object to it, if the Court please. He is asking the witness to determine the question that is before the Court.

The Court: Objection sustained.

Mr. Rosenblum: It seems to me, your Honor—I don't want to argue needlessly—that the witness from Pittsburgh, the Pittsburgh Screw and Bolt Company, testified as to that. Why couldn't this witness also testify?

Mr. Houts: He testified to facts.

Mr. Rosenblum: I am asking him if he knows.

Mr. Reeder: You can not tell this Court that we ever asked any witness whether or not it had value, or asked for a conclusion—we showed what the facts were and it is a question for the Court to determine.

The Court: The objection has been sustained.

Mr. Rosenblum: You may inquire.

Mr. Reeder: No questions.

Mr. Rosenblum: That is all, then, Mr. Williams.

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[fol. 372] The Court: We will announce an adjournment until tomorrow morning at ten o'clock.

Mr. Rosenblum: I think we will say the defendants rest.

Defendants rest.

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Mr. Reeder: We can finish in five minutes.

The Court: Very well.

Mr. Rosenblum: I may have overlooked offering in evidence that page that the witness identified in this Classification No. 11. I would like to have considered in evidence page 291, Rule 25, and I would like also to offer in evidence Exhibits A to H, which we have identified.

The Court: Very well.

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Defendants' Exhibits A, G and H are in words and figures as follows, to-wit:





# **CONSOLIDATED FREIGHT CLASSIFICATION NUMBER 11**

Publishing the Ratings, Rules and Regulations of the Official, Southern, Western and Illinois Classifications

Item	ARTICLES	RATINGS			Item	ARTICLES	RATINGS		
		Official Illinois	Southern	Western			Official Illinois	Southern	Western
	<b>IRON OR STEEL—Continued:</b>					<b>IRON OR STEEL—Continued:</b>			
1	Lag Bolts (Lag Screws), in packages:				15	Plate or Sheet, N.O.I.B.N.—Continued:			
	L. C. L. ....	4	4	4		Galvanized, Painted or Plain,			
	C. L., min. wt. 36,000 lbs. ....	5	6	5		corrugated or not corrugated:			
2	Lathing or Ribbing:					L. C. L. ....	4	6	4
	In packages, L. C. L. ....	4	4	4		C. L., min. wt. 36,000 lbs. ....	5	6	5
	C. L., min. wt. 36,000 lbs. ....	5	6	5	16	Perforated:			
3	Machine Bed Plates, Housings or Frames made from welded forged plates, in the rough and requiring further machine work to make complete machine part:				17	L. C. L. ....	3	6	3
	L. C. L. ....	4	4	4		C. L., min. wt. 36,000 lbs. ....	5	6	5
	C. L., min. wt. 36,000 lbs. ....	5	6	5	18	Planished, Polished, Hammered-Polished or Russia:			
4	Mill Cinder or Mill Scale:					In boxes or crates, L. C. L. ....	4	4	4
	In barrels, L. C. L. ....	4	6	4		C. L., min. wt. 36,000 lbs. ....	5	6	5
	C. L., min. wt. 56,000 lbs. ....	6	Derio	D	19	Plates, Structural, N.O.I.B.N., or Floor:			
5	Pebbles, Grinding or Polishing (Pebble Castings, Bar Cuttings or Punchings, suitable for Grinding or Polishing Mills):				20	L. C. L. ....	4	4	4
	In bags, barrels or boxes, L. C. L. ....	4	4	4		C. L., min. wt. 36,000 lbs. ....	5	6	5
	C. L., min. wt. 40,000 lbs. ....	5	6	5	21	Poles, Trolley:			
6	Pig Iron or Spiegel-eisen (Spiegel Iron):					With attachments:			
	L. C. L. ....	4	6	4		L. C. L. ....	43	3	43
	C. L., min. wt. 50,000 lbs. ....	6	Derio	D		C. L., min. wt. 30,000 lbs. ....	44-45	6	A
7	Pins, Bridge or Drift:				22	Without attachments:			
	In packages, or if weighing each 25 lbs. or over, loose, L. C. L. ....	4	6	4		L. C. L. ....	R26	4	4
	C. L., min. wt. 36,000 lbs. ....	5	6	5		C. L., min. wt. 36,000 lbs. ....	5	6	5
8	Pipe Billet Tubing (rough pipe for seamless tube manufacture):				23	Props (Supports), Mine:			
	L. C. L. ....	4	4	4		L. C. L. ....	4	6	4
	C. L., min. wt. 36,000 lbs. ....	5	6	5		C. L., min. wt. 36,000 lbs. ....	5	6	5
					24	Rails, N.O.I.B.N.:			
						L. C. L. ....	4	6	4
						C. L., min. wt. 40,000 lbs. ....	5	6	5
						Rings, rolled steel, N.O.I.B.N.:			
						In packages, or if weighing each 25 lbs. or over, loose, L. C. L. ....	R26	4	4
						C. L., min. wt. 36,000 lbs. ....	5	6	5

4	<b>Mill Cinder or Mill Scale:</b>				
	In barrels, L. C. L.	4	6	4	
	C. L., min. wt. 56,000 lbs.	6	Der 10	D	
5	<b>Pebbles, Grinding or Polishing</b>				19
	(Pebble Castings, Bar Cut-				20
	tings or Punchings, suitable				
	for Grinding or Polishing				
	Mills):				21
	In bags, barrels or boxes, L. C. L.	4	4	4	
	C. L., min. wt. 40,000 lbs.	5	6	5	
6	<b>Pig Iron or Spiegel-eisen (Spiegel</b>				22
	Iron):				
	L. C. L.	4	6	4	
	C. L., min. wt. 50,000 lbs.	6	Der 10	D	
7	<b>Pins, Bridge or Drift:</b>				23
	In packages, or if weighing each 25				
	lbs. or over, loose, L. C. L.	4	6	4	
	C. L., min. wt. 36,000 lbs.	5	6	5	
8	<b>Pipe Billet Tubing (rough pipe for</b>				24
	seamless tube manufacture):				
	L. C. L.	4	4	4	
	C. L., min. wt. 36,000 lbs.	5	6	5	
9	<b>Plate, Armor or Deck:</b>				25
	L. C. L.	4	4	2	
	C. L., min. wt. 36,000 lbs.	5	6	4	
10	<b>Plate, Nail or Tack:</b>				26
	L. C. L.	4	5	4	
	C. L., min. wt. 36,000 lbs.	5	6	5	
11	<b>Plate, Sheet or Strip, copper, brass</b>				
	or bronze coated by electrolytic				
	or hot dipped process:				
	L. C. L.	4	4	4	27
	C. L., min. wt. 36,000 lbs.	5	6	5	
12	<b>Plate or Sheet, nickel-clad:</b>				28
	L. C. L.	3	3	3	
	C. L., min. wt. 30,000 lbs.	45	5	A	
13	<b>Plate or Sheet, N.O.I.B.N.:</b>				29
14	<b>Crystallized, decorated, em-</b>				
	bossed, enameled, ja-				
	panned, lacquered, litho-				
	graphed, marbleized, nickel				
	plated or printed:				
	In boxes or in crates lined with				
	fibreboard, L. C. L.	3	3	3	
	In packages named or strapped				
	on skids, C. L., min. wt.				31
	30,000 lbs.	45	5	A	
	<b>Floor:</b>				
	L. C. L.	4	4	4	
	C. L., min. wt. 36,000 lbs.	5	6	5	
	<b>Poles, Trolley:</b>				
	<b>With attachments:</b>				
	L. C. L.	43	3	43	
	C. L., min. wt. 30,000 lbs.	445	6	A	
	<b>Without attachments:</b>				
	L. C. L.	R26	4	4	
	C. L., min. wt. 36,000 lbs.	5	6	5	
	<b>Props (Supports), Mine:</b>				
	L. C. L.	4	6	4	
	C. L., min. wt. 36,000 lbs.	5	6	5	
	<b>Rails, N.O.I.B.N.:</b>				
	L. C. L.	4	6	4	
	C. L., min. wt. 40,000 lbs.	5	6	5	
	<b>Rings, rolled steel, N.O.I.B.N.:</b>				
	In packages, or if weighing each 25				
	lbs. or over, loose, L. C. L.	R26	4	4	
	C. L., min. wt. 36,000 lbs.	5	6	5	
	<b>Rods, Tie, Structural, N.O.I.B.N.:</b>				
	L. C. L.	4	6	4	
	C. L., min. wt. 36,000 lbs.	5	6	5	
	<b>Scrap, not copper clad, see Note 9:</b>				
	In packages, or in pieces weighing				
	each 50 lbs. or over, loose, L. C. L.	4	6	4	
	C. L., min. wt. 40,000 lbs., Rule 24				
	not to apply	6	Der 10	D	
	<b>Note 9—Ratings apply on scraps or pieces having value</b>				
	<b>for re-melting purposes only.</b>				
	<b>Scrap, copper clad, in barrels or</b>				
	boxes:				
	L. C. L.	R26	4	4	
	C. L., min. wt. 40,000 lbs.	5	6	5	
	<b>Sheet, aluminum coated:</b>				
	In bundles, L. C. L.	R26	2	2	
	In boxes or crates, L. C. L.	4	3	3	
	C. L., min. wt. 36,000 lbs.	5	6	5	
	<b>Sheet, lead coated, in packages:</b>				
	L. C. L.	4	4	4	
	C. L., min. wt. 36,000 lbs.	5	6	5	
	<b>Skelp:</b>				
	L. C. L.	4	6	4	
	C. L., min. wt. 50,000 lbs.	5	Der 10	D	

See page 40 for explanation of abbreviations and other characters.

DEFENDANTS' EXHIBIT A.

280

[fol. 374]

Defendants' Exhibit G.

2/6/40

No. 28215

BG:EDS

Interstate Commerce Commission  
Washington

Jan. 12, 1940

Valley Steel Products Company, et al.

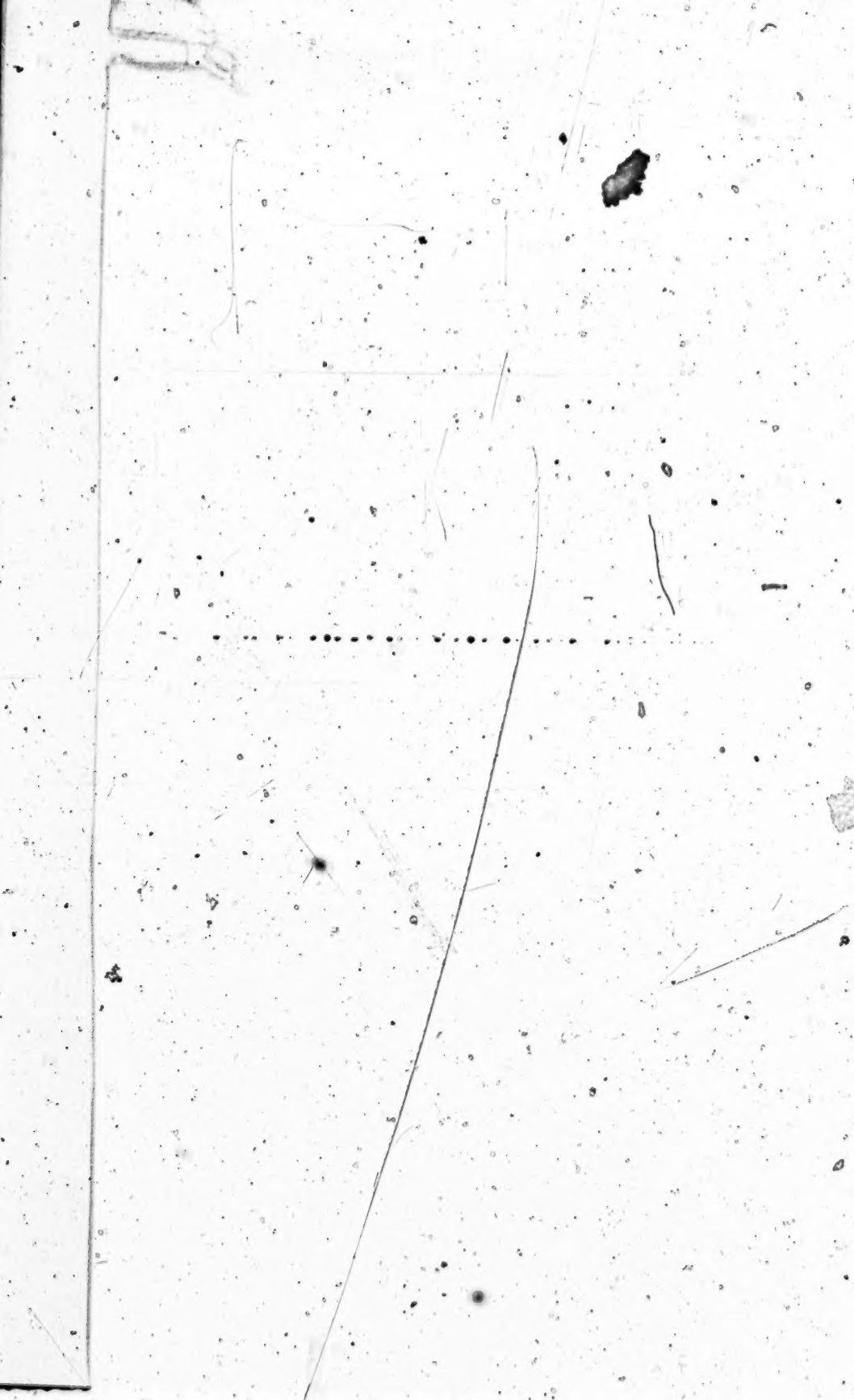
No. 28215. vs.

The Atchison, Topeka and Santa Fe Railway Company,  
et al.

The above-entitled case is assigned for hearing on Feb.  
29, 1940, ten o'clock a. m. (standard time), at the County  
Court House, Cairo, Ill., before Examiner Snider.

By the Commission:

W. P. BARTEL,  
Secretary.





# **CONSOLIDATED FREIGHT CLASSIFICATION NUMBER 11**

Publishing the Ratings, Rules and Regulations of the Official, Southern, Western and Illinois Classifications

291

Item	ARTICLES	RATINGS			Item	ARTICLES	RATINGS		
		Official Illinois	Southern	Western			Official Illinois	Southern	Western
1	Pipe Balls, Pipe Manufacturers' iron or steel: In packages, or if weighing each 15 lbs. or over, loose, L. C. L. C. L., min. wt. 36,000 lbs.	4	4	4	18	PIPE FITTINGS—Continued: Rings, thread protecting, iron, in packages: L. C. L. C. L., min. wt. 36,000 lbs.	4	6	4
2	Pipe Coils, N.O.I.B.N.:				19	Strainers, Pipe Line:	5	6	5
3	Aluminum, copper, brass or bronze, in barrels, boxes or crates	4 1/2	4 1/2	4 1/2	20	Copper, brass or bronze body: In boxes, L. C. L. In boxes, C. L., min. wt. 30,000 lbs.	2	2	2
4	Iron or steel: L. C. L. C. L., min. wt. 24,000 lbs., Rule 34	R26 5	3 6	3 A	21	Iron or steel body: In packages, or if weighing each 25 lbs. or over, loose, L. C. L. C. L., min. wt. 36,000 lbs.	R26 4 1/2	4 5	4 A
5	PIPE FITTINGS:				22	Supports, iron or steel, consisting of Anchors, Arches, Brackets, Chairs, Rests, Rolls or Sleeves: In packages, or if weighing each 25 lbs. or over, loose, L. C. L. C. L., min. wt. 36,000 lbs.	R26 5	4 6	4 5
6	Cocks or Valves, including Gate Valves, N.O.I.B.N.:				23	Pipe Fittings, N.O.I.B.N., see Note 1:			
7	Copper, brass or bronze, not plated, or copper, brass or bronze body, not plated, in barrels, boxes or crates, or if weighing each 100 lbs. or over, loose or on skids: L. C. L. C. L., min. wt. 30,000 lbs.	2 4	2 4	2 4	24	Note 1—Ratings will apply on gaskets or washers not in excess of the equipment for pipe fittings which they accompany.			
8	Cupre-nickel or Nickel-copper, plated or not plated, in barrels, boxes or crates: L. C. L. C. L., min. wt. 30,000 lbs.	1 3	1 3	1 3	25	Copper, brass or bronze, not plated, see Note 2, in bags, barrels or boxes: L. C. L. C. L., min. wt. 30,000 lbs.	3 4	4 1/2 5	4 1/2 4
9	Iron or steel, not plated, or iron or steel body, not plated: In packages, or if weighing each 25 lbs. or over, loose or on				26	Note 2—Ratings also apply on fittings lead covered or lead or tin lined.			

	over, loose or on skids:				23	Pipe Fittings, N.O.I.B.N., see			
	L. C. L.	2	2	2		Note 1:			
	C. L., min. wt. 30,000 lbs.	4	4	4	24	Note 1—Ratings will apply on gaskets or washers not in excess of the equipment for pipe fittings which they accompany.			
8	Cupro-nickel or Nickel-copper, plated or not plated, in barrels, boxes or crates:				25	Copper, brass or bronze, not plated, see Note 2, in bags, barrels or boxes:			
	L. C. L.	1	1	1					
	C. L., min. wt. 30,000 lbs.	3	3	3					
9	Iron or steel, not plated, or iron or steel body, not plated:					L. C. L.	3	43	43
	In packages, or if weighing each 25 lbs. or over, loose or on skids, L. C. L.				26	C. L., min. wt. 30,000 lbs.	4	5	4
	C. L., min. wt. 36,000 lbs.	R26	3	3	27	Note 2—Ratings also apply on fittings lead covered or lead or tin lined.			
0	Lead composition body, in barrels, boxes or crates:	5	6	5		Cupro-nickel or Nickel-copper, plated or not plated, in barrels or boxes:			
1	Nickel plated, in barrels or boxes:	2	2	2		L. C. L.	2	42	42
	L. C. L.	2	2	2	28	C. L., min. wt. 30,000 lbs.	R26	3	3
2	C. L., min. wt. 30,000 lbs.	4	4	4		Iron or steel, not plated:			
3	Silver plated, in barrels or boxes:	1	1	1		In packages, or if weighing each 25 lbs. or over, loose, L. C. L.	4	6	4
						C. L., min. wt. 36,000 lbs.	5	6	5
4	Connections, lead and brass combined, in barrels or boxes:				29	Iron or steel, combined with copper, brass or bronze, not plated, in bags, barrels or boxes or barrels with cloth tops:			
5	With stopcock attached, L. C. L.	2	2	2		L. C. L.	R26	4	4
	Without stopcock, L. C. L.	3	3	3		C. L., min. wt. 36,000 lbs.	5	6	5
	C. L., min. wt. 36,000 lbs.	4	4	4	30	Iron or steel, lead covered or lead lined, not plated, in barrels, boxes or crates:			
6	Expansion Joints:					L. C. L.	R26	4	4
	Copper, brass or bronze, or with copper, brass or bronze body:					C. L., min. wt. 36,000 lbs.	4	6	5
	In barrels, boxes or crates, L. C. L.	2	2	2					
	In packages or on skids, C. L., min. wt. 30,000 lbs.	4	4	4	31	Iron or steel, rubber lined, not plated:			
7	Iron or steel, or with iron or steel body:					In packages, or if weighing each 25 lbs. or over, loose, L. C. L.	2	2	2
	In packages, or if weighing each 25 lbs. or over, loose or on skids, L. C. L.	3	3	3		C. L., min. wt. 36,000 lbs.	4	4	4
	C. L., min. wt. 36,000 lbs.	5	6	5	32	Iron or steel, tin lined, not plated, in barrels, boxes or crates:			
	Hangers, iron or steel, N.O.I.B.N.:					L. C. L.	3	4	3
	In packages, or if weighing each 25 lbs. or over, loose, L. C. L.	4	6	4		C. L., min. wt. 36,000 lbs.	4	6	4
	C. L., min. wt. 36,000 lbs.	5	6	5					

See page 49 for explanation of abbreviations and other characters.

Repts Ex. H

DEFENDANTS' EXHIBIT H.281

# CONSOLIDATED FREIGHT CLASSIFICATION NUMBER 11

Publishing the Ratings, Rules and Regulations of the Official, Southern, Western and Illinois Classifications

Item	ARTICLES	RATINGS			Item	ARTICLES	RATINGS		
		Official Ratings	Southern	Western			Official Ratings	Southern	Western
	<b>PIPE FITTINGS—Continued:</b>					<b>PIPE AND ELBOWS, SHEET METAL—Continued:</b>			
	Pipe Fittings, N.O.I.B.N., see Note 1—Continued:				18	Stove Pipe Elbows, iron, steel or tin:			
1	Iron or steel, wood lined:					In bundles or crates, L. C. L.	1½	1½	1½
	In packages, or if weighing each					In boxes, L. C. L.	1	1	1
	25 lbs. or over, loose, L. C. L.	4	5	4		C. L., min. wt. 10,000 lbs., Rule 34	2	2	2
2	C. L., min. wt. 36,000 lbs.	5	6	5					
	Lead, in barrels, boxes or crates:				19	Pipe or Pipe Casing, Bored or Built-up, wooden, lined or not lined:			
	L. C. L.	3	3	3		Inside diameter over 6 inches, L.C.L.	3	3	3
3	C. L., min. wt. 36,000 lbs.	5	6	5		Inside diameter 6 inches or less, L.C.L.	R26	4	4
	Nickel plated, in barrels or boxes:					C. L., min. wt. 30,000 lbs., Rule 34	6	A or B	C
	L. C. L.	3	43	43	20	Mixed C. L. with iron Pipe Fittings, N.O.I.B.N., not plated, fittings not to exceed 10% in weight of shipment, min. wt. 30,000 lbs., Rule 34	5	A or B	C
4	C. L., min. wt. 30,000 lbs.	4	4	4					
5	Silver plated, in barrels or boxes	1	1	1					
6	<b>PIPE AND ELBOWS, SHEET METAL:</b>				21	Pipe Stems or Mouthpieces, or Cigar or Cigarette Holders, in barrels or boxes	1	1	1
7	Heating Furnace Pipe or Elbows (Air or Smoke Flues), iron, steel or tin, see Note:				22	<b>PIPES, TOBACCO, in barrels or boxes:</b>			
	Double:				23	Common Clay or Corn Cob:			
	In bundles, L. C. L.	1½	1½	1½		L. C. L.	2	2	2
	In boxes or crates, L. C. L.	1	1	1		C. L., min. wt. 30,000 lbs.	4	4	4
8	C. L., min. wt. 10,000 lbs., Rule 34	2	2	2	24	<b>Pipes, Tobacco, N.O.I.B.N., see Note</b>	1	1	1
	Single, side seams closed:				25	Note—Ratings also apply on shipments in metal strapped fibre boxes meeting requirements of Rule 41 for boxes testing not less than 275 lbs., except that boxes must not exceed 90 united inches and gross weight of 100 lbs.			
	Not nested, in bundles, L. C. L.	D1	D1	D1					
	Not nested in boxes or crates, or nested, in bundles, L. C. L.	1½	1½	1½					
	Nested, in boxes or crates, L.C.L.	1	1	1					
9	C. L., min. wt. 10,000 lbs., Rule 34	2	2	2					
	Single, side seams not closed, nested, in packages:								
	L. C. L.	R26	4	4					



7	<b>Double:</b> In bundles, L. C. L. ....	1½	1½	1½	21	<b>*Pipe Stems or Mouthpieces, or Cigar or Cigarette Holders, in barrels or boxes</b>	1	1	1
	In boxes or crates, L. C. L. ....	1	1	1	22	<b>PIPES, TOBACCO, in barrels or boxes:</b>			
	C.L., min. wt. 10,000 lbs., Rule 34	2	2	2	23	<b>Common Clay or Corn Cob:</b>			
8	<b>Single, side seams closed:</b>					L. C. L. ....	2	2	2
	Not nested, in bundles, L. C. L. ....	D1	D1	D1		C. L., min. wt. 30,000 lbs. ....	4	4	4
	Not nested in boxes or crates, or nested, in bundles, L. C. L. ....	1½	1½	1½	24	<b>Pipes, Tobacco, N.O.I.B.N., see Note</b>	1	1	1
	Nested, in boxes or crates, L. C. L. ....	1	1	1	25	<b>Note—Ratings also apply on shipments in metal strapped fibre boxes meeting requirements of Rule 41 for boxes testing not less than 275 lbs., except that boxes must not exceed 90 united inches and gross weight of 100 lbs.</b>			
9	C.L., min. wt. 10,000 lbs., Rule 34	2	2	2					
	<b>Single, side seams not closed, nested, in packages:</b>								
	L. C. L. ....	R26	4	4					
	C. L., min. wt. 36,000 lbs. ....	5	6	5	26	<b>Piston Rings, iron, in barrels or boxes:</b>			
10	<b>Note—Heating Furnace Pipe or Elbows include Angles, Collars, Offsets, Shoes and Stackheads.</b>					L. C. L. ....	2	2	2
11	<b>Heating Furnace or Stove Pipe, iron, steel or tin, side seams not closed, nested, or Sheet Iron or Steel or Tin Plate, and not to exceed a total of 8,000 lbs. of Heating Furnace or Stove Pipe Elbows, iron, steel or tin, or Stove Pipe, side seams closed, iron, steel or tin, or Stove Pipe Thimbles, plate, or sheet iron or steel or tin, mixed C. L., min. wt. 36,000 lbs.</b>				27	<b>PITCH:</b>			
					28	<b>Brewers' or Pine, in barrels or boxes:</b>			
						L. C. L. ....	4	5	4
						C. L., min. wt. 40,000 lbs. ....	6	A or 8	C
					29	<b>Montan, in burlap bags:</b>			
						L. C. L. ....	4	4	4
						C. L., min. wt. 36,000 lbs. ....	6	A or 8	B
					30	<b>Pitch, N.O.I.B.N.:</b>			
					31	<b>Ground:</b>			
						In paper lined bags or in barrels, L. C. L. ....	4	4	4
						In bags or barrels, C. L., min. wt. 40,000 lbs. ....	6	D or 10	D
12	<b>Stove Pipe, black tin, chrome plated, in boxes.</b>	1½	1½	1½	32	<b>Not ground:</b>			
13	<b>Stove Pipe, iron, steel or tin plate:</b>					In metal cans completely jacketed, L. C. L. ....	2	4	4
14	<b>Side seams closed:</b>					In metal cans in barrels, boxes or crates, L. C. L. ....	3	4	4
	Not nested, in boxes or crates, L. C. L. ....	1½	1½	1½		In metal cans completely jacketed, or in metal cans in barrels, boxes or crates, C. L., min. wt. 40,000 lbs. ....	5	D or 10	D
	Nested, in boxes or crates, L. C. L. ....	1	1	1		In bulk in barrels with or without heads, or in bags, see Note, L. C. L. ....	4	5	4
	C.L., min. wt. 12,000 lbs., Rule 34	2	2	2		In bulk in barrels with or without heads, or in bags, cakes or slabs, C. L., min. wt. 40,000 lbs., or in tank cars, C. L., Rule 35. ....	6	D or 10	D
15	<b>Side seams not closed, nested, in packages:</b>					(Continued)			
	L. C. L. ....	R26	4	4					
	C. L., min. wt. 36,000 lbs. ....	5	6	5					
16	<b>* Stove Pipe Tee Joints and Draft Regulators combined, in boxes:</b>								
	L. C. L. ....	1	1	1					
	C. L., min. wt. 14,000 lbs., Rule 34	3	3	3					
17	<b>Stove Pipe Elbows, black tin, chrome plated, in boxes.</b>	D1	D1	D1					

See page 40 for explanation of abbreviations and other characters.

Refts' Ex. "H"

[fol. 377] Thereupon the plaintiffs, to further sustain the issues in their behalves, offered the following evidence in rebuttal:

E. A. THARP, having been heretofore duly sworn, testified further in behalf of plaintiffs, in rebuttal, as follows:

Direct Examination.

By Mr. Houts:

Q. Mr. Tharp, have you heard the testimony of Mr. Williams in respect to the rates from the two Louisiana points to St. Louis, on certain commodities?

A. Yes, sir.

Q. The rate, I believe he said, from one point, from Lake Charles, was 61 cents, and from the other point it was 55 cents, was it?

A. 62 cents from Lake Charles and 55 cents from Rodessa.

Q. Will you read from the tariff all the provisions in respect to that rate, on that article that he testified about?

A. Mr. Williams was quoting from Item 2440, Section 2, of J. R. Peel's Tariff I. C. C. 2888. First, let me say that at the top of the page of this tariff, page 114, on which page Item 2440 appears, it is stated: "Carloads, except as otherwise indicated".

Section 2 of Item 2440 reads:

"Iron and steel articles as follows: Pipe, steel or wrought iron; welded or seamless.

[fol. 378] Pipe connections, couplings and fittings; iron or steel (other than cast iron or steel), not plated, or body steel, not plated (See Note 1)."

Immediately following that appear these words:

"In mixed carloads with articles named in Item 2400 or with articles described in Item 2450, provided that the combined weight of the pipe and/or pipe connections, couplings or fittings, do not exceed  $33\frac{1}{3}$  per cent. of the entire weight of the shipment, minimum weight 40,000 pounds."

This Item 2440 carries a specific exception to the general application that appears at the top of the page, that is, "Carloads, except as otherwise named", making the



item apply only on mixed carloads where such mixed carload contained no more than  $33\frac{1}{3}$  per cent. of pipe fittings.

Q. Mr. Tharp, does that rule with the provision as to not more than  $33\frac{1}{3}$  per cent.—

A.  $33\frac{1}{3}$  per cent.

Q. Does that, in your opinion, from your knowledge of rates, and of the tariff, apply to a whole carload of iron thread protecting rings?

A. According to my opinion it would not, because of this qualification.

Q. Mr. Tharp, have you heard Mr. Williams' testimony about Rule 25, in respect to iron and steel?

A. Yes.

Q. Will you state the tariff provision applicable to that rule and your opinion about that?

A. As I understood Mr. Williams' testimony, it was [vol. 379] that Rule 25 and this Item 18 in the classification covering iron thread protecting rings, did not apply, because, in this Item 2440 there was a specific commodity rate on the rings.

Q. That is the item you have just been talking about?

A. That is right. I have shown there is not a specific commodity rate in that item; therefore, the classification does apply, and Rule 25 would also apply, inasmuch as it is a rule in the classification.

Q. To state that again, in another way, Rule 25 says that iron or steel—how does that read?

A. Rule 25 reads: "Iron versus Steel Unless the contrary appears, the word 'iron' wherever used in this classification includes, also, steel; and vice versa."

Q. The tariff item applying to iron rings reads how; have you got that there?

A. It reads, "Rings, thread protecting, iron, in packages."

The Court: What is that?

The Witness: "Rings"—

The Court: The last word is all I want.

The Witness: "In packages."

The Court: All right.

Mr. Houts: That is all.

## Cross-Examination.

By Mr. Rosenblum:

Q. On this first tariff you were reading from there is in Section 2 a black or bold-face heading, "Iron and [fol. 380] Steel Articles": Those words are in bold-face type?

A. They are, yes, followed by the words "as follows".

Q. Now, doesn't that "Iron and Steel Articles" relate to each one of the three classes mentioned in that item, or in that Section 2 of Item 2440? A. It does.

Q. And doesn't it relate to each one of those three items? A. In a mixed carload, yes.

Q. It doesn't say so, does it?

A. The lower half of the item sets up the general provision that any of those items—any of the articles named in the item must be contained in a mixed carload, with other articles of iron or steel named in other items of the tariff.

Q. Would it not be just as fair to say that the other construction would apply, if you found pipe, steel or wrought-iron, welded or seamless, as the first one and you found pipe connections, couplings and fittings, iron or steel, as the second one—these things in mixed carloads with articles named in Item 2400 or described in 2450, with the provision that follows them? Would that not be as fair and reasonable a construction of that as the one you have given it?

A. No, I don't think so. I happen to know something about the conditions under which that item was put into the tariff and I know it was the intention of the framers to put in there just what I have said, and I happen to know that that is the way it is applied in ordinary application.

Q. Let me ask you this question: Has there not always [fol. 381] been a substantial doubt in the minds of the railroads as to whether the scrap iron tariff applies to these articles shipped, or this pipe fitting rate?

A. No, there has never been any doubt about the application of the tariff.

Q. What has the doubt been about?

A. I don't know that there has been any doubt about any of it. The only doubt that I could see that could arise would be as to exactly what the commodity was that was shipped.

There could be no doubt as to the tariff, once we determine what the commodity is.

Q. So, right straight along there has been some doubt as to what this commodity really is, on the part of the railroads?

A. I can not speak from personal knowledge, because I have had nothing to do with this particular controversy until I came into court here.

Q. But you know about the controversy and know about the doubt?

A. It is pure hearsay. I have heard of it.

Q. You have heard of it in your official duties and occupation as freight man with the Rock Island—

A. I can't say that I heard of it except through correspondence. I had some correspondence—

The Court: Are you both talking about the same thing? Are you asking this witness about the same thing that he is answering about?

Mr. Rosenblum: He says the doubt was about—

The Court: I understood him to say he knew of no doubt.

The Witness: No. My statement, your Honor, was that [fol. 382] there is no doubt in my mind as to the proper rate to apply on thread protecting rings. There is no doubt in my mind as to the proper rate to apply on scrap iron. The controversy, if there is one, is as to what the character of this commodity is.

The Court: Certainly, and that is exactly what you testified before, but counsel is questioning you along an idea that there is some doubt—

Mr. Rosenblum: If I phrased my question that way it has been unintentional. I have only had in mind asking him if he knew about this doubt as to the ultimate nature of the commodity.

Mr. Reeder: I don't think you should carry it further if it is concerning correspondence—

Mr. Rosenblum: I am just asking him what he knows about this doubt.

Mr. Reeder: He has not said that there was any doubt about anything that we are concerned with here.

Mr. Rosenblum: I think that is the whole issue we are concerned with here.

The Court: Unless I am very much mistaken, his construction of what he meant by doubt, as indicated by your question, is what I understand the witness to mean. I think there is confusion here between you and the witness as to the expression of that doubt.

Am I right about that?

[fol. 383] Mr. Houts: I think you are exactly right. I think counsel is asking him about something else and the witness is telling him there is no doubt about the application of the tariff, that there may be in a certain instance doubt as to what is in the car, and that has to be proven, and he refers to correspondence.

Mr. Rosenblum: Let me ask you this question: If you, as a freight man, were to examine a carload of iron pipe thread protecting rings and found that none of them could be used for the purpose for which they were originally intended, and that all of them could only be remelted, there would be no doubt in your mind about what rate would apply, would there?

A. If I could determine to my own satisfaction that the rings were nothing but pieces or parts of iron or steel, having value only for remelting purposes, there would be no doubt in my mind as to what rate would apply on that article; that would be the scrap iron rate.

Q. That rate did apply on many carloads of shipments of these articles; did you know that?

A. No; it didn't apply, to my knowledge, on any cars of these articles that we are here concerned with.

Q. Is it your opinion, then, that in so far as these pipe thread protectors were new, or in so far as they were fit only for remanufacturing purposes, that they would take the same rate?

A. Let me have the question again.

[fol. 384] Q. I will reframe it; I don't think it is clear. Is it your opinion that under the applicable tariff rates that,



regardless of whether the shipment consisted of new thread protectors, or whether it consisted of thread protectors that could be only remanufactured, not value only for remelting, they should take the same rate?

A. Yes; there is no distinction in the tariffs between new and used articles of this character.

Mr. Rosenblum: That is all.

Mr. Reeder: That is all.

The Court: Very well.

Mr. Reeder: Your Honor, I tender Findings of Fact and Judgment.

Mr. Rosenblum: We would like to have an opportunity to submit something, if you will give us a day's time in which to submit Findings of Fact.

The Court: How much time do you want?

Mr. Rosenblum: Whatever time your Honor wants to give us; a short time.

I would like to suggest to the Court that, since this testimony has gone over a substantial period of time, perhaps the Court would be inclined to have the testimony written up, which we will be glad to have done, and submit at the [fol. 385] same time with that testimony requested Findings of Fact and Conclusions of Law, and a brief.

The Court: Very well; I will do that.

Mr. Reeder: I don't see how the testimony can be of any help to the Court after sitting here and listening to the case.

The Court: I will tell you what I am inclined to do in this matter. I will be glad to hear arguments on it. We may have time tomorrow. I may be able to hear arguments from counsel on this tomorrow.

Mr. Reeder: That will be all right. We want to avoid delay, and we have reason for it.

The Court: If counsel desire, I will hear arguments in the case tomorrow morning.



Mr. Reeder: That is agreeable to the plaintiffs.

Mr. Rosenblum: I am not certain—I would like to have a little bit of time in which to prepare Findings of Fact. I thought this case would be on tomorrow.

The Court: You can determine that after we hear the arguments.

Mr. Rosenblum: I think we have a right to submit something.

The Court: Oh, yes; you have a right to submit something. I will hear the arguments tomorrow morning or tomorrow afternoon.

[fol. 386] Mr. Reeder: I think we would rather have tomorrow morning.

Mr. Houts: I would like it if your Honor can arrange it that way.

Mr. Reeder: ~~Mr. Houts~~ can then get the one o'clock train.

The Court: I will hear you at ten o'clock.

Mr. Bailiff, adjourn court until tomorrow morning at ten o'clock.

At this point, an adjournment was taken until February 7, 1940, at ten o'clock A. M.

[fol. 387] Met, pursuant to adjournment as above, on February 7, 1940, at ten o'clock A. M.

~~Appearances~~: Same as heretofore noted.

The Court: You may proceed, gentlemen.

Mr. Reeder: We ask leave to amend so that wherever the word "iron" appears, the words "or steel" be added, so it will read "iron or steel".

Mr. Rosenblum: I object to that, your Honor. The case was tried on the petition, which contained the words and designation iron pipe thread protecting rings. All the witnesses testified they are iron, except one.

Mr. Reeder: No; they testified they are iron or steel, and originally it was difficult to tell whether it was iron or steel. The tariff covers both iron and steel.

The Court: The objection is overruled.

Thereupon counsel for plaintiffs and defendants, respectively, made their closing arguments to the Court, at the conclusion of which the Court stated as follows:

The Court: There is no doubt in my mind at all in this matter. I do not think this is scrap iron. I do not believe that they are entitled to that rate, and the course of dealing, over a long period of time, shows that, as a matter of fact, it never was used in that way.

[fol. 388] Plaintiffs may submit Findings of Fact and Conclusions of Law.

Mr. Reeder: We have done that, your Honor.

The Court: Yes, you have.

Mr. Rosenblum: We burned a little midnight oil and prepared some also, which we would like to submit—  
Findings of Fact and Conclusions of Law.

The Court: Very well.

Which were all of the proceedings had upon the trial of the cause.

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[fol. 389] (Findings of Fact and Conclusions of Law of District Court.)

✓ (Filed February 7, 1940.)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company, A Corporation, Plaintiffs,  
No. 188. vs. Div. No. 2.

Lester A. Crancer and George B. Fleischman, Co-Partners, Doing Business Under the Firm Name of Valley Steel Products Company and Mid-Valley Steel Company, Respectively, Defendants.

### Findings of Fact.

The Court finds the facts as follows:

1. That the facts stated in the stipulation of facts of the parties herein are as so stipulated.

2. That at the times of all of the shipments mentioned in the stipulation of facts there were on file with the Interstate Commerce Commission tariffs providing rates for the shipment of various articles over the routes and from the points of origin and to the points of destination involved in all of the shipments named in the statement of facts, which provided rates for the shipment of pipe fittings, described as iron thread protecting rings; that said tariffs as to the shipments involved in Counts II, III, V, VI and VII of the petition provided for the payment of a ten per cent penalty on the shipment of such iron thread protecting rings loose in cars; and that said tariffs as to all the shipments involved provided that:

[fol. 390] "Except as otherwise provided, when a number of different articles, for which ratings or rates are provided when in straight carloads, are shipped at one time by one consignor to one consignee and destination, in a mixed carload, they will be charged at the straight carload rate (not mixed carload rate) applicable to the highest classed or rated article contained in such mixed carload and the carload minimum weight will be the highest provided for any article in the carload."

3. That each of the carload shipments involved in Counts II, III, V, VI and VII, described in the stipulation of facts, contained iron pipe thread protecting rings, which are pipe fittings, iron thread protecting rings, as described in said tariffs; and that said iron pipe thread protecting rings were loaded and carried in said cars loose, and not in packages.

4. That the tariffs on file with the Interstate Commerce Commission at the times of the movements of the seven shipments involved in Counts I to VII, inclusive, of the petition mentioned in the stipulation of facts, for shipment of iron pipe thread protecting rings, in packages, were as follows:

Count I	97¢	per cwt.
Count II	85½¢	per cwt.
Count III	61¢	per cwt.
Count IV	97¢	per cwt.
Count V	81¢	per cwt.
Count VI	78¢	per cwt.
Count VII	69¢	per cwt.

5. That the total freight charges on the seven shipments involved in Counts I to VII, inclusive, mentioned in the stipulation of facts, based upon the said rates per cwt. in packages, plus ten per cent penalty for loading and shipment loose and not in packages as to Counts II, III, V, VI and VII, that is to say, the lawful charges under said tariffs, and the balances due after crediting the amounts paid as stated in the stipulation of facts, are as follows, to-wit:

[fol. 391]

Count	Total Charges	Balances Due
I	\$584.72	\$210.98
II	915.11	594.02
III	376.43	208.13
IV	652.03	235.27
V	747.55	529.41
VI	638.35	390.85
VII	425.80	94.81

6. That the tariffs on file with the Interstate Commerce Commission at the times of the movements of all of the shipments mentioned in the stipulation of facts, as to all shipments between the points of origin and points of destination of said shipments, provided that ratings on scrap iron or scrap steel apply only on pieces, separate or combined, of iron or steel having value for remelting purposes only; that said iron or steel pipe thread protecting rings in said seven shipments mentioned in the stipulation of facts were not iron or steel having value for remelting purposes only.

#### Conclusions of Law.

The Court declares the law to be that the plaintiffs are entitled to recover on the several counts of plaintiff's petition in the following sums, to-wit:

## Count

## Balances Due

I	\$210.98
II	594.02
III	208.13
IV	235.27
V	529.41
VI	390.85
VII	94.81

or a total sum of

\$2,263.47

GEO. H. MOORE,  
District Judge.

[fol. 392] (Findings of Fact and Conclusions of Law Requested by Defendants.)

(Filed February 7, 1940.)

Findings of Fact.

The Court finds the facts as follows:

1. That the shipments mentioned in Counts I to VII inclusive of plaintiffs' petition and mentioned in the evidence were not iron pipe thread protecting rings; that plaintiffs' Exhibits 4, 5, 13, 14 and 15 were not iron pipe thread protecting rings; that the pipe thread protecting rings mentioned in the evidence and including plaintiffs' exhibits 4, 5, 13, 14 and 15 were made of and composed of steel and not iron.

2. That the shipments mentioned in the Stipulation of Facts and mentioned in the evidence consisted of scrap steel having value for remelting purposes only; that the tariffs on file with the Interstate Commerce Commission at the times of the movements of all the shipments mentioned in the Stipulation of Facts as to all shipments between the points of origin and points of destination of said shipments provided that rates on scrap steel apply only on pieces, separate or combined, of steel having value for remelting purposes only; that the defendants paid charges based upon such rate for the movement of scrap steel as to all of the shipments mentioned in the Stipulation of Facts; that the freight charges actually



paid heretofore by the defendants upon the shipments mentioned in the Stipulation of Facts were the full freight charges due from defendants to plaintiffs on account of said shipments, and that there is no further sum due from defendants to plaintiffs upon said shipments.

3. That the lawful charges under said rates on scrap steel applicable to said shipments mentioned in said Stipulation of Facts are as follows:

Count I	—	\$373.74
Count II	—	321.09
Count III	—	168.30
Count IV	—	416.76
Count V	—	218.14
Count VI	—	225.00
Count VII	—	151.47

4. That as to the shipments mentioned in Counts II, III and VI of plaintiffs' petition, the following tariff mentioned in the evidence of plaintiffs as being applicable thereto is not the tariff lawfully and legally applicable to said shipment, namely, Agent J. R. Peel's Tariff I. C. C. 2795, Supplement 49, Item 2068 B, containing explanations of Section C, which is in words and figures as follows:

"Section C—Subject to Item 15—Iron or Steel or Iron Body Pipe Couplings, Connections and Fittings (See Note 2); Pipe Hangers; Iron Fire Hydrants or Plugs; Cast Iron Service or Valve Boxes; Iron and Iron Body Valves (See Note 2); Valve Springs; Water Gates; Steel Drill Rods; Iron Body Well Pipe Screens or Strainers; Water Meter and Stop Cock Boxes; in straight or mixed carloads; minimum weight 46,000 pounds. (See Note 3)".

That as to said Counts II, III and VI, the commodity contained in the shipments mentioned in the evidence is not mentioned in the said tariff; that said tariff does not contain the term or expression "pipe thread protecting rings".

5. That the tariff mentioned in the plaintiffs' evidence, to-wit, Agent L. E. Kipp's Tariff I. C. C. 1399 Item 2305 "rings, thread protecting, iron", as being the lawful and applicable rate to the shipment mentioned in Count I of

plaintiffs' petition, is not the lawful rate applicable to such shipment; that the commodity contained in said shipment mentioned in Count I of the petition was not iron thread protecting rings.

6. That the tariff mentioned in the plaintiffs' evidence, to-wit, L. E. Kipp's Tariff I. C. C. 1394 Item 2305, "rings, thread protecting, iron" as being the lawful and applicable rate mentioned in Count IV of plaintiffs' petition, is not the lawful rate applicable to such shipment; that the commodity contained in said shipment mentioned in Count IV of the petition was not iron thread protecting rings.

7. That the tariff mentioned in the plaintiffs' evidence, to-wit, Consolidated Freight Classification No. 11 Agent R. C. Fyfe's Tariff I. C. C. 24, Page 291 Item 18 "rings, thread protecting, iron, in packages", as being the lawful and applicable rate mentioned in Counts V and VII of plaintiffs' petition, is not the lawful rate applicable to such shipment; that the commodity contained in said shipment mentioned in Counts V and VII of the petition was not iron thread protecting rings in packages.

8. That with reference to the shipments mentioned in Counts V and VII of plaintiffs' petition, Rule 25 of the Consolidated Freight Classification No. 11 mentioned in the evidence does not apply to said shipments, Rule 25 being in words and figures as follows, to-wit:

"Iron versus Steel: Unless the contrary appears, the word 'iron' wherever used in this classification includes, also, steel; and vice versa."

nor does said rule apply to any of the shipments mentioned in plaintiffs' petition.

9. That the applicable tariff rates on file with the Interstate Commerce Commission at the times of the movements of the seven shipments involved in Counts I to VII inclusive of the petition, mentioned in the Stipulation of Facts, for shipment of the commodity contained in said shipments, and the total charges, were as follows:

	Shipped from	Rate per cwt.	Total
Count I	Shelby, Montana	62	\$373.74
Count II	Wickett, Texas	33	321.09
Count III	Kilgore, Texas	30	168.30
Count IV	Lamont, Calif.	62	416.76
Count V	Lake Charles, La.	26	218.14
Count VI	Odessa, Texas	30	225.00
Count VII	Rodessa, La.	27	151.47

Grand Total ..... \$2,066.89

10. That the tariff mentioned in the evidence by plaintiffs, which is in words and figures as follows, to-wit:

“Except as otherwise provided, when a number of different articles, for which ratings or rates are provided when in straight carloads, are shipped at one time by one consignor to one consignee and destination, in a mixed carload, they will be charged at the straight carload rate (not mixed carload rate) applicable to the highest classed or rated article contained in such mixed carload and the carload minimum weight will be the highest provided for any article in the carload.”

is not applicable to the articles in the shipments named in Counts I to VII inclusive of plaintiffs' petition; that the said shipments did not contain different articles shipped at one time by one consignor to one consignee and destination in a mixed carload, for which said different articles [fol. 396] ratings or rates are provided when in straight carloads.

11. That the penalties mentioned in the evidence and the rates and the tariffs concerning said penalties as to the shipments involved in Counts II, III, V, VI and VII are not applicable to said shipments.

12. That on or about March 16, 1939 the defendants herein filed as Complainants before the Interstate Commerce Commission a Complaint wherein the plaintiffs in this cause, among others, were named as defendants; that said Complaint was docketed No. 28215 by the said Interstate Commerce Commission; that the points of origin and destination mentioned in said Complaint before the Commission include the points of origin and destination on the shipments set forth in Counts I to VII in

plaintiffs' petition; that the aforesaid Complaint directly and completely covers and includes the shipments alleged to have been made in plaintiffs' petition herein; that said Complaint is now pending before the Commission and is set for hearing before the said Commission at Cairo, Illinois on February 29, 1940; that said Complaint involved and requires a determination and interpretation by the Interstate Commerce Commission of tariffs mentioned in said Complaint; that in said Complaint the rates mentioned sought to be collected by plaintiffs in Counts I to VII inclusive are attacked and charged as being unjust, unreasonable, illegal, unjustly discriminatory and unduly prejudicial in violation of Sections 1, 2, 3 and 6 of the Interstate Commerce Act; that the determination of whether the rates charged in said Complaint as aforesaid are unjust, unreasonable, illegal, unjustly discriminatory, and unduly prejudicial requires the exercise by the Interstate Commerce Commission of its function as a legislative, administrative and judicial tribunal;

13. That none of the articles mentioned in the evidence as having been contained in the shipments mentioned in Counts I to VII inclusive at the time of their delivery to [fol. 397] the defendants were fit for the purpose for which they were originally intended.

14. That none of the articles mentioned in the evidence as having been contained in the shipments mentioned in Counts I to VII inclusive at the time of their delivery to the defendants had any recognized commercial value other than for junk purposes.

15. That the articles mentioned in the evidence as having been shipped to the defendants were all abandoned, discarded, rusted and otherwise damaged articles gathered largely by scrap iron dealers and stored in their yards along with other scrap steel and iron.

16. That there was no evidence introduced to show any difference between the transportation characteristics of the commodity contained in the shipments mentioned in the evidence and the transportation characteristics of any other type of scrap steel or scrap iron.

## Conclusions of Law.

The Court declares the law to be as follows:

1. That the plaintiffs are not entitled to recover on their petition, and that its judgment shall be in favor of the defendants.

2. That rates applicable to the shipment of the commodity mentioned in the evidence may not be based upon the use which is to be made of a commodity.

3. That the character of the commodity contained in the shipments mentioned in the evidence must be determined at the time the shipment begins, and cannot be changed so far as the application of rates is concerned by the subsequent conduct of either the consignor or the consignee.

4. That in any doubtful case in the construction of a tariff, in order to arrive at the intent of its framers, the Court is warranted in considering how rates claimed [foi. 398] would operate as a matter of justice.

5. That it considers how the rates claimed by the plaintiffs in this case would operate as a matter of justice, and it finds as a matter of law that the rates claimed by the plaintiffs in this case would operate to create an injustice to defendants in that the rates claimed to be applicable by plaintiffs on the abandoned, discarded, rusted articles actually shipped to defendants are also collected on the same identical articles when shipped new when the value of said abandoned, discarded, rusted articles, at the time of the shipment of them to defendants was in some instances as little as ten percent of the value of such articles when new.

6. That in fixing the rate applicable to the articles mentioned in said shipments, it may not inquire into the character, business and equipment of the consignee so that if the consignee happens to be a steel mill equipped to remelt the articles, the scrap iron rate is applied, but if the consignee has no remelting facilities and puts the material to some other use which does not entail remelting, the scrap iron rate is not applied even though the articles are identical in kind.



7. That the decision of the Interstate Commerce Commission in Docket No. 27535, entitled, Lester A. Crancer and George B. Fleischman, co-partners et al vs. Abilene & Southern Railway Company et al, submitted July 14, 1937 and decided August 6, 1937, and thereafter by amendment of said decision by the Interstate Commerce Commission, is not controlling of the facts and issues contained in the case before this Court; that said decision does not constitute any evidence concerning the issue in this cause.

8. That said decision by the said Interstate Commerce Commission is not res. judicata of the issue in this cause, that said decision of the said Commission is not controlling or persuasive upon this Court in a decision of [fol. 399] this cause.

9. That this Court has no jurisdiction to proceed with the trial of this cause or to render its decision or judgment herein pending the outcome of that certain Complaint wherein defendants herein are complainants, brought before the Interstate Commerce Commission on March 16, 1939, being docketed No. 28215 and mentioned in the Findings of Fact herein; that the rates sought to be collected herein by the plaintiffs are charged in said Complaint with being unjust, unreasonable, illegal, unjustly discriminatory and unduly prejudicial in violation of Sections 1, 2, 3 and 6 of the Interstate Commerce Act of the United States; that the determination of whether the rates charged in said Complaint before said Commission as aforesaid are unjust, unreasonable, illegal, unjustly discriminatory and unduly prejudicial requires the exercise by the Interstate Commerce Commission of its function as a legislative, administrative and judicial tribunal, and that pending such determination, this Court has no jurisdiction to proceed with the trial of this cause of action, or render judgment herein; that the inquiry with reference to said rates is essentially one of fact and discretion and technical matters to be made and had by the Interstate Commerce Commission, whose jurisdiction concerning said rates challenged in said Complaint before said Commission is exclusive.

10. That the burden of proof to establish the allegations contained in plaintiffs' petition herein by prepon-

derance of the evidence is upon the plaintiffs; that the plaintiffs have not sustained said burden of proof and have failed to prove the allegations in their petition necessary to recovery by plaintiffs; that the plaintiffs have failed to prove that the articles contained in said shipments are iron pipe thread protecting rings as alleged in plaintiffs' petition, and therefore may not recover.

[fol. 400] 11. That there was no evidence introduced which proved or tended to prove that the articles shipped in the shipments mentioned in the evidence had a commercial value other than for remelting purposes.

12. That it was established by the preponderance of the evidence that the articles contained in the shipments mentioned in the evidence had a commercial value for remelting purposes only.

Refused.

GEO. H. MOORE,  
District Judge.

[fol. 401]

Judgment:

(Filed Feb. 7, 1940.)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company, a Corporation, Plaintiffs,  
No. 188. vs. Div. No. 2.

Lester A. Crancer and George B. Fleischman, Co-Partners, Doing Business Under the Firm Names of Valley Steel Products Company and Mid-Valley Steel Company, Respectively, Defendants.

This cause having heretofore come on for hearing upon the pleadings, the stipulation of facts of the parties, and the evidence adduced before the Court, a jury not having been demanded, and the Court being now fully advised of and concerning all matters, finds the issues for the plaintiffs, Frank O. Lowden, James E. Gorman and

Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company, a corporation, and against the defendants, Lester A. Crancer and George B. Fleischman, co-partners, doing business under the firm names of Valley Steel Products Company and Mid-Valley Steel Company, respectively, on all of the seven counts of the petition, in the amounts, as follows, to-wit:

[fol. 402] Count	Amount
I	\$ 210.98
II	594.02
III	208.13
IV	235.27
V	529.41
VI	390.85
VII	94.81

or a total sum of \$2,263.47

Wherefore, it is Ordered, Adjudged And Decreed by the Court that said plaintiffs, Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company, a corporation, have and recover of the defendants, Lester A. Crancer and George B. Fleischman, co-partners, doing business under the firm names of Valley Steel Products Company and Mid-Valley Steel Company, respectively, the sum of Two Thousand Two Hundred Sixty-three Dollars and Forty-seven Cents (\$2,263.47), together with interest thereon at the rate of six per cent (6%) per annum from this date, and plaintiffs' costs in this case, and that plaintiffs have execution therefor, as provided by law.

GEO. H. MOORE,  
Judge.

[fol. 403] (Docket Entry of Filing of Motion of Defendants for New Trial.)

"Feb. 16, 1940. Motion of defendants for a new trial filed."

## [fol. 404] Defendants' Motion for a New Trial.

(Filed Feb. 16, 1940.)

Come now the above defendants by their attorneys, and move this Honorable Court to set aside the Findings of Fact and Conclusions of Law, and the judgment in accordance therewith, filed and entered in the above entitled cause, assessing the damages of the plaintiffs against the defendants in the aggregate sum of \$2,263.47, and to grant the defendants a new trial. For grounds for the said motion defendants state:

1. The finding and judgment is against the evidence.
2. The finding and judgment is against the weight of the evidence.
3. The finding and judgment is not supported by any evidence in the case.
4. The judgment is against the law.
5. The judgment is against the law and the evidence.
6. The Court erred in admitting incompetent, irrelevant and immaterial evidence offered by the plaintiffs and objected to by the defendants.
7. The Court erred in excluding competent, relevant and material evidence offered by the defendants.
- [fol. 405] 8. The Court erred in the making of each and every one of the findings of fact and conclusions of law made by the Court herein.
9. The Court erred in failing and refusing to make findings of fact and conclusions of law and each and every one thereof requested by the defendants.
10. The Court erred in proceeding with the trial of the above entitled cause and rendering judgment herein while there was pending a certain Complaint wherein defendants herein were complainants, and plaintiffs were a party defendant, brought before the Interstate Commerce Commission on March 16, 1939, being Docket No. 28215.



11. The Court erred in refusing and excluding offers of proof made by the defendants to show that said Complaint mentioned in the foregoing paragraph was pending before said Commission and was set before an examiner thereof on February 29, 1940 for a hearing thereof, and that said Complaint involved the rates sought to be collected herein by the plaintiffs in this cause of action.

12. The Court erred in admitting in evidence over defendants' objection, the decisions of the Interstate Commerce Commission, offered by plaintiffs, in Docket No. 27535 entitled Lester A. Crancer and George B. Fleischman, co-partners et al, vs. Abilene & Southern Railway Company, et al, submitted July 14, 1937 and decided August 6, 1937 and thereafter by amendment of said decisions by the Interstate Commerce Commission for the reasons that said decision constituted no evidence whatsoever in said cause, and for the further reason that said decision was not res adjudicata of any issue in this cause of action, and for the further reason that said decision was not any evidence as to what were the applicable freight rates on the thread protecting rings mentioned in the evidence.

13. The Court erred in admitting over the objection of defendants incompetent, irrelevant and immaterial evidence.

[fol. 406] 14. The Court erred in admitting over the objection of defendants incompetent, irrelevant and immaterial letters and documents offered by plaintiffs, dated during the years 1936 and 1939, for the reason that said letters and documents were too remote from any of the issues involved in this cause of action.

15. The Court erred in refusing to find that the commodity mentioned in the Stipulation of Facts and mentioned in the evidence consisted of scrap steel having value for remelting purposes only.

16. The Court erred in permitting the defendants to amend their petition by interlineation so as to add the words "or steel" after the word "iron", so that said petition as amended read "iron or steel pipe thread protecting rings."



17. The Court erred in refusing to find as a conclusion of law that the burden proof as contained in plaintiffs' petition by a preponderance of the evidence was upon the plaintiffs.

18. The Court erred in refusing to find that the plaintiffs had not sustained said burden of proof.

19. The finding and judgment should have been for the defendants.

Respectfully submitted,

IRL B. ROSENBLUM,  
BERNARD MELLITZ,  
Attorneys for Defendants

Copy of the foregoing motion mailed to attorneys for plaintiffs this 16th day of February, 1940.

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[fol. 407] (Docket Entry of Filing of Notice to Docket Motion for New Trial for Hearing.)

"Feb. 19, 1940. Notice to docket for hearing motion of defendant for a new trial, filed."

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[fol. 408] Record Entry Showing Argument, Submission and Overruling of Defendants' Motion for New Trial.

April 1, 1940.

Now come the parties by their respective attorneys and argue and submit to the Court motion of defendant for a new trial, and the Court having duly considered said motion and being fully advised in the premises doth order that said motion be and is hereby overruled.

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[fol. 409] Docket Entry Showing Filing of Order Extending Time Within Which to File Transcript of Record on Appeal in United States Circuit Court of Appeals, Eighth Circuit.

July 18, 1940.

Order filed and entered granting defendants an extension of time to and including September 25, 1940, within which to file transcript of record on appeal in United States Circuit Court of Appeals, Eighth Circuit.

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## [fol.410] Designation of Contents of Record on Appeal.

(Filed Sept. 17, 1940.) —

To the Honorable Clerk of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri:

You will prepare, certify, and transmit to the Circuit Court of Appeals for the Eighth Circuit, the following parts of the record and proceedings in the above cause:

1. Transcript of all proceedings, papers, documents, petitions, motions, process, orders of Court, judgment, and all things had and done in said cause in the District Court, with dates of the filing thereof, including:
2. Plaintiffs' petition as amended,
3. Transcript of the evidence and proceedings had upon the trial of said cause,
4. Stipulation of facts,
5. Findings of facts and conclusions of law of the Court,
6. Findings of Facts and conclusions of law proposed by appellant and refused by the Court,
7. Final judgment of the Court,
8. Appellants' motion for new trial and order thereon,
9. Notice of appeal and Bond for supersedeas of judgment and costs and order approving said bond,
10. Order extending time in which to file transcript of the record.

I. B. ROSENBLUM,  
BERNARD MELLITZ,  
ROSENBLUM & MELLITZ,  
Attorneys for Defendants.

Received a copy of the above and foregoing Designation of Contents of Record on Appeal this 16th day of September, 1940.

SULLIVAN, REEDER &  
FINLEY,  
Attorneys for Plaintiffs-Appellees.

[fol. 411]

## Clerk's Certificate.

United States of America,  
 Eastern Division of the  
 Eastern Judicial District  
 of Missouri.—ss.:

I, Jas. J. O'Connor, Clerk of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri Do Hereby Certify the above and foregoing to be a full, true and complete transcript (except insofar as the same is restricted by the designation of the contents of the record on appeal heretofore set out) of the record and proceedings in case No. 188, wherein, Frank O. Lowden, et al., Trustees, etc., are plaintiffs and Lester A. Crancer, et al., etc., are defendants, as fully as the same remains on file and of record in my office.

Seal  
 U. S. District Court  
 East. Div. of the  
 East. Judicial Dist.  
 of Missouri.

In Testimony Whereof, I have here-  
 unto subscribed my name and  
 affixed the seal of said Court at  
 office in the City of St. Louis, in  
 said Division of said District  
 this 25th day of September, in  
 the year of our Lord, Nineteen  
 Hundred and forty.

JAS. J. O'CONNOR,

Clerk of said Court.

By C. E. Rudolph,

Deputy Clerk.

Filed Sep. 25, 1940, E. E. Koch, Clerk.

[fol. 412] Appellants' Statement of Points to be Relied  
 Upon on Appeal.

In the United States Court of Appeals, Eighth Circuit.  
 Frank O. Lowden, James E. Gorman and Joseph B. Flem-  
 ing, Trustees of the Chicago, Rock Island and Pa-  
 cific Railway Company, a Corporation, Appellees,  
 No. 11,859. vs.

Lester A. Crancer and George B. Fleischman, Co-partners,  
 doing business under the firm names of Valley Steel  
 Products Company and Mid-Valley Steel Company,  
 respectively, Appellants.

Come now Appellants, and for their statement of points to be relied upon on appeal, assert that the following errors were committed by the trial court, and that said points are intended to be urged by Appellants in their brief:

I. The Court erred in overruling the amended motion of the Appellants to stay proceedings, and in overruling Appellants' plea to the jurisdiction and plea in abatement.

II. The Court erred in adopting, giving and making the findings of fact and conclusions of law which were proposed by the Appellees. Said conclusions of law are as follows:

"The Court declares the law to be that the plaintiffs are entitled to recover on the several counts of plaintiff's petition in the following sums, to-wit:

Count	Balances Due
I	\$ 210.98
II	594.02
III	208.13
IV	235.27
V	529.41
VI	390.85
VII	94.81

or a total sum of \$2,263.47"

[fol. 413] III. The Court erred in refusing to adopt, give and make the findings of fact and conclusions of law proposed by the Appellants. Said conclusions of law are as follows:

"The Court declares the law to be as follows:

1. That the plaintiffs are not entitled to recover on their petition, and that its judgment shall be in favor of the defendants.

2. That rates applicable to the shipment of the commodity mentioned in the evidence may not be based upon the use which is to be made of a commodity.

3. That the character of the commodity contained in the shipments mentioned in the evidence must be deter-

mined at the time the shipment begins, and cannot be changed so far as the application of rates is concerned by the subsequent conduct of either the consignor or the consignee.

4. That in any doubtful case in the construction of a tariff, in order to arrive at the intent of its framers, the Court is warranted in considering how rates claimed would operate as a matter of justice.

5. That it considers how the rates claimed by the plaintiffs in this case would operate as a matter of justice, and it finds as a matter of law that the rates claimed by the plaintiffs in this case would operate to create an injustice to defendants in that the rates claimed to be applicable by plaintiffs on the abandoned, discarded, rusted articles actually shipped to defendants are also collected on the same identical articles when shipped new when the value of said abandoned, discarded, rusted articles, at the time of the shipment of them to defendants was in some instances as little as ten percent of the value of such articles when new.

6. That in fixing the rate applicable to the articles mentioned in said shipments, it may not inquire into the character, business and equipment of the consignee so that if [fol. 414] the consignee happens to be a steel mill equipped to remelt the articles, the scrap iron rate is applied, but if the consignee has no remelting facilities and puts the material to some other use which does not entail remelting, the scrap iron rate is not applied even though the articles are identical in kind.

7. That the decision of the Interstate Commerce Commission in Docket No. 27535, entitled, Lester A. Crancer and George B. Fleischman, co-partners et al. vs. Abilene & Southern Railway Company et al., submitted July 14, 1937 and decided August 6, 1937, and thereafter by amendment of said decision by the Interstate Commerce Commission, is not controlling of the facts and issues contained in the case before this Court; that said decision does not constitute any evidence concerning the issue in this cause.

8. That said decision by the said Interstate Commerce Commission is not res judicata of the issue in this cause,



that said decision of the said Commission is not controlling or persuasive upon this Court in a decision of this cause.

9. That this Court has no jurisdiction to proceed with the trial of this cause or to render its decision or judgment herein pending the outcome of that certain Complaint wherein defendants herein are complainants, brought before the Interstate Commerce Commission on March 16, 1939, being docket No. 28215 and mentioned in the Findings of Fact herein; that the rates sought to be collected herein by the plaintiffs are charged in said Complaint with being unjust, unreasonable, illegal, unjustly discriminatory and unduly prejudicial in violation of Sections 1, 2, 3 and 6 of the Interstate Commerce Act of the United States; that the determination of whether the rates charged in said Complaint before said Commission as aforesaid are unjust, unreasonable, illegal, unjustly discriminatory and unduly prejudicial requires the exercise by the Interstate Commerce Commission of its function as a legislative, administrative and judicial tribunal, and that pending such determination, this Court has no jurisdiction to proceed with the trial of this cause of action, or render judgment herein; that the inquiry with reference to said rates is essentially one of fact and discretion and technical matters to be made and had by the Interstate Commerce Commission, whose jurisdiction concerning said rates challenged in said Complaint before said Commission is exclusive.

10. That the burden of proof to establish the allegations contained in plaintiffs' petition herein by preponderance of the evidence is upon the plaintiffs; that the plaintiffs have not sustained said burden of proof and have failed to prove the allegations in their petition necessary to recovery by plaintiffs; that the plaintiffs have failed to prove that the articles contained in said shipments are iron pipe thread protecting rings as alleged in plaintiffs' petition, and therefore may not recover.

14. That there was no evidence introduced which proved or tended to prove that the articles shipped in the shipments mentioned in the evidence had a commercial value other than for remelting purposes.

12. That it was established by the preponderance of the evidence that the articles contained in the shipments mentioned in the evidence had a commercial value for remelting purposes only.

IV. The District Court erred in proceeding with the trial of said cause before him while there was pending before the Interstate Commerce Commission of the United States a complaint brought by Appellants, which directly and completely involved and required a determination and interpretation by the Interstate Commerce Commission of the tariffs and freight rates which were the subject to controversy in the cause of action tried by the said District Court; that in said complaint the rates therein mentioned sought to be collected by Appellees in the cause of [fol. 416] action in said United States District Court were attacked and charged as being unjust, unreasonable, illegal, unjustly discriminatory and unduly prejudicial, in violation of Sections 1, 2, 3 and 6 of the Interstate Commerce Act; that by virtue thereof the determination of the issues raised in the cause pending in said District Court should not have been had before said District Court, and said District Court had no jurisdiction to proceed with the trial of the case before it until there had been a decision by the Interstate Commerce Commission of the things and matters contained in said complaint; that in said complaint before said Interstate Commerce Commission the pendency of this cause of action before the District Court was set forth.

V. The Court erred in overruling Appellants' motion for a new trial.

VI. The Court erred in permitting the Appellees to amend their petition by interlineation so as to add the words "or steel" after the word "iron" so that said petition as amended read "iron or steel pipe thread protecting rings."

VII. The Court erred in rendering judgment in favor of Appellees and against Appellants.

VIII. The Court erred in admitting incompetent, irrelevant and immaterial evidence offered by the Appellees and objected to by the Appellants, and erred in excluding

and rejecting competent, relevant and material evidence offered by the Appellants, and there follows the full evidence so admitted or rejected and the objections and rulings thereon:

1. "Since that is the situation, we would like at this time to again object to the Court trying this case, for the reason that it has no jurisdiction to proceed, because the reasonableness of the rates involved in this suit is in question before the Commission and the hearing is set for February 29.

I say this by way of argument, and I understand that your Honor has a right to disregard it if you wish, but there is a companion case pending before Judge Davis. We filed the same motion to stay proceedings and his division and he overruled that motion. However, he had previously [fol. 417] set the case and he says this in his memorandum:

"In view, however, of the matters set up by the defendants we are of the opinion that if the Interstate Commerce Commission is going to reopen the investigation of the rates in controversy the trial of this matter should be postponed.

The Court: This Court has already passed on that. The motion is overruled and we will proceed.

Mr. Rosenblum: Note our exception.

The Court: That is not necessary, under the new Rules.

Mr. Bailiff, announce a brief recess.

(At this point a brief recess was had.)

Mr. Rosenblum: I don't want to tire the patience of the Court, but with reference to the motion I just made I think I ought to make a record here, so that the matter can be properly preserved.

So, I would like to offer in evidence, on my motion, the complaint that is pending before the Interstate Commerce Commission, in the case of Valley Steel Products Company, et al, vs. Atchison, Topeka and Santa Fe Railway Company, being docketed as No. 28215. A copy of that complaint is attached to our motion to stay proceedings. I would like to offer that in evidence.

I would like to make an offer of proof to show that the hearing before the Commission has been set in St. Louis for February 29, 1940.

Mr. Houts: It has been set at Cairo, Illinois, instead of St. Louis. The first setting was in St. Louis.

Mr. Rosenblum: I would also like to offer to prove that the reasonableness of the rates sought to be collected in this suit before your Honor is challenged in this complaint.

As to the setting of the cause and the challenges for reasonableness, I would like to put Mr. Williams on the stand, unless it is admitted that those are the facts.

Mr. Reeder: You mean, as to the setting of the case?

Mr. Rosenblum: As to the setting of the case and as to the fact that the reasonableness of the rates sought to be collected in this petition is challenged in that complaint before the Commission.

Mr. Houts: I think we want to object to the offer on the ground that the matter offered to be proved, if it could be proved, would constitute no defense or grounds for a continuance or stay.

The Court: Sustained.

Mr. Rosenblum: Now we are ready.

\* \* \* \* \*

2. Q. What is the purpose of your inspection, Mr. McGrane? A. The purpose of that?

Q. Yes; why do you inspect them?

A. Proper description.

[fol. 418] Q. So that it can be given the proper rate?

Mr. Rosenblum: I object to that, your Honor, as leading and suggestive, and no evidence—

The Court: Overruled.

Mr. Reeder: Is that correct?

A. Yes, sir.

3. Mr. Reeder: I will offer in evidence Plaintiffs' Exhibits 2 and 3, the reports of inspection made by this witness of the two cars which are covered by Counts 1 and 7.

Mr. Rosenblum: Note our objection to the introduction of these reports in evidence. The witness has testified from a book, having refreshed his recollection, and these two papers have no probative value.

The Court: Objection overruled.

4. Q. You haven't read quite all that was there on page 216, because there is a note 9, which I may read: "Ratings apply on scraps or pieces having value for remelting purposes only."

In making this change from this item which is on page 216, designated as "Scrap not copper clad" to the other item on page 291, which was "Rings, thread protecting, iron, in packages", you came to the conclusion, did you, that these articles had some other value than for remelting purposes?

A. Yes.

Q. Was that your conclusion? A. Yes, sir.

Q. And so for that reason you found some other classification under which they could come?

A. Pipe fittings, under that head there as thread protecting rings.

Q. Did you know anything at all about the value of those articles? A. No, sir.

Mr. Rosenblum: I move that this witness' testimony be stricken from the record as having no probative value to decide what this commodity was in this car, or in these cars.

He said that he changed the rating, or the classification, from one which was entitled "Scrap not iron clad in packages or pieces weighing each 50 pounds. Carload minimum weight, 50,000 pounds. Note 9. Ratings apply on scrap or pieces having value for remelting purposes only."

He changed that to the pipe fitting classification appearing on page 291, which reads: "Rings, thread protecting, iron, in packages."

These were not in packages, but we will skip that. He changed that on the theory that this was not scrap iron, but it was pipe fittings.



(At this point the hearing was interrupted by the return of a jury with a verdict in a criminal case.)

The Court: We will return to our case again. You may proceed.

Mr. Rosenblum: I will state briefly the point I was making in my motion to strike out this witness' testimony. [fol. 419] He changed this from scrap iron, which has no value for remelting purposes to pipe fittings classification. He just now testified that he has no knowledge whatever of the value of this material.

Under the case which we cited, the essential thing about scrap iron is that it has, and shall have, a commercial value for remelting purposes only.

The District Court in Kansas City, by Judge Otis, in the Sonken-Galamba case, that went to the Court of Appeals of this Circuit, said it mattered not that some of this material could be used again after reworking, but that the value involved was the commercial value. This witness changed its classification and introduced in evidence this paper or document. I move to strike out the document as not having any probative value in this case, and because this witness changed that classification without knowing the value.

Mr. Reeder: We offer this inspection, your Honor, to determine the proper description of this commodity, what it was. We are not asking this witness to fix the classification. It appears that he is thoroughly capable of doing so, but we will do that by other testimony.

The Court: The motion is overruled.

5. Q. From your observation and experience were they in such a condition as that they could be used?

A. They were usable.

Mr. Rosenblum: Just a second, please. I object to that question, for the reason that it has no value, and does not tend to prove or disprove any issue in this case. It violates the ruling of the Supreme Court, that the use of the material can not be any criterion as to rating.

The Court: Read the question.

(Last previous question read to the Court.)

The Court: Objection overruled. The witness may answer.

Mr. Reeder: Go ahead, Mr. Witness.

Mr. Rosenblum: I would like to object again, because this witness is not qualified to testify as to whether they could be used for the original purpose. They may be able to verify it.

The Court: He may answer.

6. The Witness: Any thread protector that is in excess of three inches has to be packed in accordance with the packing requirements set up in the classification.

Mr. Rosenblum: Or else it takes the penalty?

The Witness: Or else it takes the penalty.

Mr. Rosenblum: Under those circumstances, your Honor, I move that all reference to the penalty, in this count, be excluded, because there is no showing here in the evidence of the size of these protecting rings that were in that car.

Mr. Reeder: Explain again to the Court, with reference to the size of these rings, just when the penalty applies [fol. 420] plies and when it does not.

A. In this particular instance, and having in mind this particular tariff, that if the rings were in excess of three inches, I believe, in diameter—I am not sure of that—three inches in diameter, there would be a penalty of ten per cent. If they were three inches or less in diameter they would be required to be strung on wire or placed in packages, if I remember the item correctly.

Mr. Rosenblum: The testimony doesn't show what size they were at all.

Mr. Houts: May I ask a question, your Honor?

The Court: Yes.

Mr. Houts: Mr. Tharp, let me get the result here: Do you mean that, regardless of size, there is a penalty under the tariff?

The Witness: No, I don't mean that, Mr. Houts. Under the provisions of this tariff item, "Pipe fittings and valves under three inches in diameter must be packed in boxes, barrels, kegs, casks or bags, or strung on wire." If they are not packed as indicated, there would be a ten per cent penalty.

If they are over three inches in diameter and they are not packed in keeping with the provisions of the classification, there would still be a ten per cent penalty. So, whether they are three inches or more, if they were loose, there would still be a ten per cent penalty.

Mr. Houts: In this particular case, assuming that they were iron thread protecting rings, regardless of size, if they were not packed up in bundles and were all loose, there would be a penalty, under that tariff, of ten per cent?

The Witness: That is right.

Mr. Rosenblum: There is no testimony how they were in there, except that they were in there loose, but there is no showing that they were not strung on wire or in bags—I withdraw the bags, but there is no showing that they were not strung on wire; and here is Note 2 in this classification, which says, "pipe fittings and valves under three inches in diameter must be packed in boxes, barrels, kegs, casks or bags, or strung on wire." It doesn't say anything about those over that size, and it is the tariff on which they are basing the penalty. I say, there is no foundation on which to introduce evidence as to penalty.

Mr. Reeder: The testimony is to the effect that they were all loose. There is no testimony that any of them were packed. We asked them if they were packed. There is no testimony that any of them were strung on wire. Of course, if the shipper had wanted to take advantage of a lower tariff he could have packed them or put them on wire. Certainly, we can't assume that the ones down below were so packed.

I think the testimony meets the situation, your Honor.

The Court: Overruled.

7. Q. Mr. Tharp, you testified about the tariffs on seven different situations: I wish you would please tell

the Court whether all of those tariffs that you have testified about had a provision in respect to the rate which would be applied when part of the shipment was of one commodity and part of another.

[fol. 421] Mr. Rosenblum: I object to that for the reason that there is no showing that part of the shipment was one commodity and part another.

Mr. Houts: Our position on that is that we have not been able to show that every piece of metal in this car was of a particular variety, and there is a tariff provision, that I want to show, which provides that the rate applicable to the highest class of article in the car, under the mixed carload rule, applies to the entire car.

The Court: Read the question.

(Last previous question read to the Court.)

Mr. Rosenblum: This is objected to. There was no evidence to show that as to any of these cars.

The Court: Overruled. He may answer.

8. Q. Mr. Tharp, does that rule apply to shipments which contain iron thread protecting rings?

Mr. Rosenblum: If your Honor please, that obviously doesn't apply, because it says, as I recall it—I am saying this from memory—if there are different commodities—

Mr. Houts: The car, with at least part of the car containing iron thread protecting rings—

Mr. Rosenblum: That is objected to.

The Court: Overruled.

9. Q. Doesn't the contrary appear in this classification? The rule that you read said, "Unless the contrary appears the word Iron wherever used in this classification includes also steel. Now, on page 291 I will ask you, doesn't the contrary appear? and isn't it true that every other classification of pipe fittings on page 291 recites the words "iron or steel"? And I call your specific attention to these classifications that appear under Pipe Fittings, "Wherever the words are used, "pipe fittings, iron or steel not plated; or iron or steel body not plated iron or



steel, or with iron or steel body; hangers, iron or steel; iron or steel body; supports, iron or steel; pipe fittings, iron or steel, not plated; iron or steel combined with copper, brass or bronze, not plated; iron or steel covered or lead-lined, not plated; iron or steel rubber lined, not plated; iron or steel tin lined, not plated"—on the next page "Pipe Fittings, iron or steel, wood lined." And isn't it true that the classifications you referred to as "rings, thread protecting iron" is the only single place in this tariff on this page 291 where the word "iron" is used alone? Now, look at it and see.

Mr. Houts: If your Honor please, we object to that as argumentative and not tending to prove anything.

The Court: Sustained.

Mr. Rosenblum: I will rephrase the question: On Page 291 does there appear a single other instance of where the word "iron" is used alone except the place that defines "Rings, Thread Protecting, Iron, in Packages"?

Mr. Houts: If the Court please, we object to that because the question itself shows that the item in question [fol. 422] says iron only, and it is entirely immaterial what other items appear in there, for the purpose of this question.

Mr. Rosenblum: It elucidates the rule which says "unless the contrary appears".

Mr. Houts: The rule on its face shows the contrary does not appear as to the one item in question. For that reason we object to the question.

The Court: Sustained.

Mr. Rosenblum: Can you tell us what the meaning of the term is in that Rule 25, "Unless the contrary appears?"

Mr. Houts: We object to that. It is asking the witness to construe a written instrument on a question of law.

The Court: Sustained.

10. Mr. Rosenblum: Your Honor: At the time of adjourning last evening there was an argument proceed-



ing before Your Honor concerning the question that I asked, and I would like to have the opportunity of briefly stating our position about that at this time, especially in line with the fact Mr. Reeder made certain statements here to which we very strenuously objected.

In this case, as I see it from the law and the authorities that I have handed you, if the tariffs involved—and there have been two mentioned, a scrap-iron tariff and a pipe fitting rate—are such tariffs that Your Honor can interpret in the ordinary meaning of the words, then Your Honor has the right and duty to decide this case. The cases say, however, that if the tariff involves words which are used in a particular sense so that an ordinary person not a freight expert—even though he be a Judge, not a freight expert—cannot tell the meaning of those words, then that is a matter which the Commission must determine. Now the Ry-Krisp case and the Oak Tie case were the only cases that decided that. They have gone all the way up to the Supreme Court. They hold, for example, in the case of the Oak Tie case, that oak ties were not lumber as used in the classification, but that was something that did not require an expert body, such as a Commission is, to determine what the tariff meant, but they are words used in the ordinary meaning as ordinarily understood by business men. Now, if that language is in that shape so that Your Honor can interpret each one of the tariffs and apply or say what the meaning of the individual tariffs are, then Your Honor has the right and the duty to call this case. If it is such language which takes an expert body, then the Commission must decide what it is. Now, it is separate and apart and completely different from the question I raised before this trial, that if the rates are unreasonable the Commission must determine it and the Court has no right to. But it is purely now a question of interpretation of the tariffs; so that if you find during the course of this trial that the words are such as used in the ordinary meaning, then you have the right to call it, and you have the right to call it separate and apart from anything the Commission says. And that is true, because if we had gone before the Commission

for reparation and granted us reparation the Courts say, when we ask you for that reparation the Commission's ruling is not determinative. So here is a case where you have the duty, if you decide to take this case and carry it through and decide it, you have the duty to call it separate and apart from anything the Commission may have done. The last case on that page I handed Your Honor says, "No ruling is res judicata except it applies to the particular cars in question". And in any event, what the Commission decide with reference to other cars of material does not bind Your Honor and is not constructively binding upon Your Honor.

Now, the next point: And this leads directly to the question I asked this witness. If there is doubt as to which one of these tariffs apply—and I think by now there is substantial doubt as this case has developed—then that doubt should be construed in two ways. First, the cases show it should be construed in favor of the shipper and against the carrier. Second, the cases say that that doubt should be construed along such basis as would result in not rendering an injustice to the shipper. Now, there you have the whole thing which is clearly analyzed. I think it is clearly analyzed to the Court. The rate should be construed, first, in favor of the shipper; and, second, it should not be so leveled against this shipper so as to create an injustice. And I have pointed out from my previous examination of this witness that this rate that is sought to be collected in this proceeding is the same identical rate which is sought to be collected when these thread protectors are brand new, right from the manufacturers. And even they seek in this rate to assess a penalty because they pack them loose in the cars. The commodity when it is new has three or four times the value of when they are brought into the plant, and when they are shipped out from the scrap-iron yards. The freight rate, as compared with the new rate of scrap iron, is double and sometimes treble the rate which is the scrap-iron rate, and under which these cars actually moved. So now, as I recall it, the question that I asked this witness led to that particular point, and this is the question: (On request of Counsel for defendant the last two preceding questions were read, as follows:

"Q. Would it be reasonable in your opinion to apply a penalty to this sort of shipment of thread protectors after they had been used and discarded and many of which were rusted and in bad shape?

"A. I think so.

"Q. When they were shipped in open coal cars, and when the new protectors are shipped in closed cars in packages?"

Mr. Houts: I would like to answer the argument, in view of the question. The question discloses the argument is wholly beside the point and does not support the question at all, and I think we do not need to go beyond this question at the present time. The question asked is an effort to have Your Honor pass on the question of whether the published tariff is a reasonable tariff. That is a question which is not *ri* issue. The tariff as published is the law just as the State is. The Interstate Commerce Commission in the exercise of its legislative function has fixed these tariffs. It has not only fixed them as a tariff, as we have proved by Mr. Tharp, but on a complaint it has clarified the matter, if it needed any clarification, and held as to these other classifications, points of origin and destination—some are the same and some are different—but in this opinion, which we are going to introduce in evidence, the Commission has said that scrap iron does not apply except where the steel and iron has value for remelting only. The Commission has also passed on this question in this particular tariff, in its legislative function—has said when it means about the question of second-hand. This is merely an effort, now, to prove it is second-hand and to make a distinction to have Your Honor say that this law is unreasonable. That is all it is. It is not an interpretation of any terms. Of course, Your Honor can interpret this plain language. No question of interpretation involved. On that question the Commission says: "The Commission, generally, has de-[fol. 424] clined to preserve lower rates on old or second-hand articles than on like articles when shipped new." Citing a decision by the Commission. As said by Division 3, "It would be difficult, without affording an easy and convenient means of misbilling and discrimination, and impractical, to establish ratings on damaged, used or sec-

ond-hand articles different from those on like articles new." So the Commission by having on file these tariffs and by deciding this particular case, this particular complaint, has fixed the law, as a matter of law the tariff on iron protecting rings, new and used, and has said that the scrap iron rates does not apply unless the material, the iron and steel, has no value except for remelting. Now, there is no issue on the constructive language. The language is plain, and Counsel is merely trying to have the issue of the reasonableness of these rates determined.

Now, in the Prohibition case, Counsel conceded that reasonableness of the rates should not be passed on in a Court proceeding, and the pleading asking this trial to be stayed was so that he could apply to the Commission and have the Commission pass on that. Of course, Counsel was putting the shoe on the wrong foot. The burden is on the shipper to change the rate, if they want to change it. Unless and until the Commission changes and holds the rates unreasonable and gives reparation for the past and changes it as to the future, the tariff on file has the force and effect of a Statute, and it is the duty of the carrier to sue for and to collect the rate as published. And that is a question of law, and any question about trying to try out the reasonableness of this rate is not a question open to the defendant in this case. And if it were a question open to the defendant here, the opinion of this Commission on this very issue [in] conclusive and an evidentiary fact. Now, we do not say it is *res judicata* because the Commission is not a court. It is evidence and calls for evidence, as far as the Commission is concerned on this thing, just like a Statute. Judge Otis was talking about the question of the Court determining the character of the articles shipped, in one case, was not a determination of the character of the articles in another case. That is all he decided.

Mr. Rosenblum: Your Honor: I think Counsel completely misapprehends the position we take. We are not at this time seeking to challenge the reasonableness of either of these rates. We say that there is a question of doubt as to which one applies. *Hornby vs. L*, and *Davis vs. Perry*, and *Pillsbury vs. Great Northern Railroad* say that where there is no ambiguity in the



language used the rate may be unjust and yet be enforced as the established rate, but in a doubtful case in the construction of a tariff, in order to arrive at the intent of its framers, the Court is warranted in considering how rates claimed would operate as a matter of justice. I am not asking this witness whether the rates are reasonable; but where it would bring out as a matter of justice the application of the higher rate, it may be taken to the Court.

Mr. Reeder: We have two rates here. Either one of them applies. The only issue in this case is whether or not the rates are scrap iron or pipe fittings. We have a definition of scrap iron which is plain. The Statute states what scrap iron is. The Commission has gone further in stating, "Scrap iron is such discarded stuff that has no commercial value and is only good for remelting purposes." The Court of Appeals in the Eighth Circuit in this case quotes the opinion of the Commission. Here we have a very good definition of scrap iron. We have a definition of the other. The only issue we can try in this case today is whether or not these rings are scrap iron within these definitions.

[fol. 424a] The Court: Objection sustained.

Mr. Rosenblum: For the purpose of the record I would like to offer to prove: I offer to prove this witness would testify that such charge by the railroad would not be reasonable and would act, as a matter of practical effect, to create an injustice to this shipper.

Mr. Houts: Object to the offer of proof. The witness will not testify to any such thing, I venture to say. You can't make a record that way.

Mr. Rosenblum: I offer the proof.

The Court: Sustained.

11. Q. Would the collection of these higher charges in your opinion amount to an unjust enrichment of the railroads?

Mr. Reeder: That is objected to.

The Court: Sustained.



Mr. Rosenblum: I offer to prove by this witness if he was permitted to answer the question his answer would be in the affirmative.

Mr. Houts: Object to the offer of proof because it is not a proper offer of proof.

The Court: Sustained.

12. Q. Tell the Court briefly just what is this reconditioning process.

A. After these second-hand pipe thread protectors come from the oil fields and arrive at the place at which they are reconditioned, they are sorted according to sizes. Then they are taken into our reconditioning plant—

Mr. Rosenblum: One minute, if your Honor please. I didn't want particularly to object to the question, but at this time I must object to it for the reason that this witness has stated that his company has been in the business of reconditioning only for the past year. There was no showing that the pipe thread protectors that came in these cars are similar to those that this Pittsburgh Screw and Bolt Company are reconditioning.

The Court: Overruled.

13. Mr. Reeder: Mr. Perry, state whether or not these reconditioning companies recently, or in recent years, have converted the V type into the round top and round bottom type.

A. Yes.

Q. Is that being done at this time?

Mr. Rosenblum: I object to that as having no bearing on any issue in this case.

Mr. Reeder: Here is the point, your Honor: The old type was the V type. It brought one price. The round top and bottom were the new type, which commanded a lot [fol. 425] the larger resale value or purchase price value.

We expect to show by this witness they are now converting the V type into the new type, which commands a larger price and sells for a larger price.

Mr. Rosenblum: The question is what they are worth when they are shipped.

The Court: Overruled.

By Mr. Reeder:

Q. Go ahead.

A. What was that question?

Q. Whether or not they are now converting the old or V type thread protector into the round top and bottom type. A. Yes.

Q. Which type brings the most money, second-hand?

Mr. Rosenblum: I object to that as having no bearing on any issue in this case.

The Court: Overruled.

14. Mr. Reeder: You may state, if you know, whether or not your company buys the same kind of protectors, from the same fields, and the same people, that the defendants here buy their protectors from.

Mr. Rosenblum: That is objected to, unless it is limited to the time when these shipments were made.

Mr. Reeder: During the summer of 1937—I will withdraw that. At this time.

Mr. Rosenblum: That is objected to as being immaterial to any issue in this case.

The Court: Overruled.

A. At this time?

Mr. Reeder: Yes.

A. Yes, sir.

Q. What percentage of the protectors, Colona thread protectors, that your company buys in the field and reconditions, are lost? Give us the percentage that can not be reconditioned.

Mr. Rosenblum: I object to that as not having any relevancy to any issue in this case, what they did in this past year.

The Court: What does that show, Mr. Reeder?

Mr. Reeder: It shows that these thread protectors are brought in and are reconditioned and they only lose three per cent. In other words, 97.9 per cent of them are reconditioned and sold. It has a bearing—

[fol. 426] The Witness: 3.2 per cent during the year 1939.

The Court: How much?

The Witness: 3.2.

Mr. Reeder: 3.2?

A. 3.2.

Q. Will you tell the Court what condition the thread protectors must be in, in order to be reconditioned?

A. Well, as far as the ruts is concerned, that doesn't mean anything, or the dirt. In fact, if some of the threads are marred they can be retraced. If all the threads were marred you couldn't do anything with them.

Q. If they are mashed up, could you recondition them?

A. No, sir, or if they are very bad out of round, you couldn't do anything with them, but some that are just a small portion out of round, we can fix those up.

Q. With reference to this percentage, you said that 3.2 per cent of the thread protectors you get in you are unable to recondition; is that correct?

A. That is correct.

Mr. Rosenblum: I don't want to object, but the record will show that my objection should be taken to that line of questioning. I don't think it is material at all as to what they do at this time, <sup>or</sup> in 1939, or what thread protectors—

The Court: The objection may run to this line of testimony.

15. Q. If you can, and know, please tell the Court what was the prevailing price in 1937, from June to August, of scrap iron for remelting purposes only.

Mr. Rosenblum: That is objected to. There is no showing that this man is qualified to testify as to market price, and if he was in some mysterious way qualified, it would not be evidence. The best evidence is an entirely different thing.

Mr. Reeder: He is a general traffic man.

The Court: Qualify him as to his knowledge of prices. I don't think you did that.

By Mr. Reeder:

Q. Have you had an experience in scrap iron?

A. I have.

Q. Over what period of years?

A. Well, for several years.

Q. Has it been your business to keep track of the prevailing market value of scrap iron at different periods?

A. It has.

Q. That comes under your duties as General Traffic Manager, does it? A. That is one of my duties.

Q. Have you refreshed your recollection and can you [fol. 427] tell the Court what was the prevailing market price for scrap iron for remelting purposes, in 1937?

Mr. Rosenblum: I object to that as not being the proper way to prove the market price, and further, that this witness is not qualified to testify.

The Court: Overruled.

A. Twelve to seventeen dollars a gross ton.

Mr. Rosenblum: And further, that no testimony as to—well, let me make it formally:

I move that that answer be stricken out. It is not limited as to time or locality.

The Court: Overruled.

16. Plaintiffs offer in evidence the opinion of the Interstate Commerce Commission in the case of Crancer, et al. vs. Abiline and Southern Railway Company, 223 I. C. C. 375.

That is the opinion, a copy of which your Honor received a few days ago.

Mr. Rosenblum: That is objected to for the reason that it has absolutely no probative value in this case at all. It is not determinative of this case; it is not conclusive of this case. It is not even persuasive in this case.

The Court: It will be admitted, subject to the objection.

Mr. Houts: And also as reported (there is a slight correction), the same case, in 225 I. C. C., page 319.

Mr. Reeder: These are bound volumes. It has been corrected. The opinion must be introduced in evidence, to be before the Court.

Mr. Rosenblum: I would like to object further to the introduction of this and the corrected opinion, for the further reason that there has been no pleading in this case before your Honor of these reports. There has been no pleading that this case, or this opinion of the Interstate Commerce Commission, which plaintiffs seek to introduce, is res adjudicata of the issues before your Honor. The theory on which it has been offered has not been stated by counsel.

Mr. Houts: I can state the theory. It is evidence of what the correct tariff rate is.

Mr. Rosenblum: That is objected to for the reason that it does not constitute any evidence of what the correct tariff rate is.

The Court: Overruled.

17. Mr. Reeder: Plaintiffs also offer in evidence the following from the opinion of Klotz Brothers vs. Chesapeake and Ohio Railroad Company, 177 I. C. C. 557:

"Scrap iron consists of old worn out, obsolete, broken [fol. 428] and cut iron or dismantled machinery and parts thereof, entirely unfit for original use and having no commercial value except for remelting purposes", that being also found in 98 S. W. (2d) at page 458, and quoted by Judge Booth of the Circuit Court of Appeals of the Eighth Circuit, with approval as the definition of scrap iron."

Mr. Rosenblum: I object to that as not being any evidence, it is not evidence at all, of any kind.

The Court: Overruled.

18. Mr. Reeder: We offer in evidence, if we have not already done so, Plaintiffs' Exhibit 1, which is the Stipulation of Facts.



Plaintiffs' Exhibits 2 and 3, I am quite sure were offered and received.

Mr. Rosenblum: I would like to move to strike Exhibits 2 and 3. Your Honor excluded all other exhibits similar to that, and I think those two ought to be excluded also.

The Court: What are they?

Mr. Rosenblum: I think Exhibits 2 and 3 are the reports made by the witness McGrane of this inspection.

The Court: Overruled.

Mr. Reeder: I offer in evidence Plaintiffs' Exhibits 4 and 5, which are thread protectors identified by the witness as being samples from the cars inspected.

Mr. Rosenblum: I object to the introduction of those exhibits in evidence, for the reason that they are not iron pipe thread protectors.

Mr. Reeder: Plaintiffs' Exhibits 4 and 5 have already been offered and received in evidence, but I am reoffering them.

The Court: Objection overruled.

Mr. Reeder: We now offer Plaintiffs' Exhibits 13, 14 and 15, thread protecting rings identified by Mr. Perry.

Mr. Rosenblum: I object to the introduction of those in evidence, because those are rings which were manufactured, some of them, new; there is no showing that they came from these cars, and no showing that they are the same type thread protector contained in these cars involved in this case.

Mr. Reeder: They are helpful to the Court, and the testimony clearly shows that one is a new one, one is reconditioned, and one is in the condition that it is before it is reconditioned.

The Court: Overruled.

19. Q. Would a man who had no technical experience, who didn't even know whether a thread protector was iron or steel, or didn't know anything about the process of reconditioning, such as you have described, be in a posi-

tion to say whether or not any of these articles were fit [fol. 429] for the purpose for which they were originally intended, in those cars that came in?

Mr. Reeder: That is objected to as calling for a conclusion, as to what—

The Court: Read the question.

(Last previous question read to the Court.)

The Court: Objection sustained.

Mr. Rosenblum: Q. Could a person not engaged in the remanufacturing or reconditioning of thread protectors tell whether or not these thread protectors were fit for the purpose for which they were originally intended?

Mr. Reeder: Same objection. It is speculative and calls for a conclusion.

The Court: Objection sustained.

Mr. Rosenblum: What information or what knowledge would a person have to have before he could tell whether or not the thread protectors contained in those cars were fit for the purpose for which they were originally intended?

Mr. Reeder: Same objection.

The Court: Sustained.

Mr. Rosenblum: I offer to show by this witness that before any person could tell whether or not these thread protectors were fit for the purpose for which they were originally intended, they would have to be acquainted with the process of reconditioning, such as this witness has described; and would have to be acquainted with the use and general character of the thread protector.

Mr. Reeder: I object to the offer of proof, for the reasons heretofore stated.

The Court: Sustained.

20. Q. I believe you said that you don't buy scrap iron to be remelted?

Mr. Rosenblum: That is objected to as having no relevancy to any issue in this case.

The Court: Overruled.

21. Q. That is a letter that went out of your place of business?

A. Yes.

Q. To the Gulf Refining Company.

Mr. Reeder: I offer this in evidence.

[fol. 430] Mr. Rosenblum: I object to its being offered in evidence. If your Honor will look at it you will see it has absolutely no value. It doesn't tend to prove or disprove any issue in this case.

The Court: Let me see it (examining exhibit).

Mr. Rosenblum: It is dated in 1936, and is not material to this case, and doesn't prove or disprove any issue in this case.

The Court: Overruled.

Mr. Reeder: Shall I read it, or has your Honor read it?

The Court: I have read it.

Plaintiffs' Exhibit 16, last offered in evidence, is in words and figures as follows, to-wit:

(Letterhead of Valley Steel Products Co.)

"Saint Louis, Mo.

July 2, 1936.

Gulf Refining Co.,

Port Arthur, Texas.

Gentlemen:

Now—we offer \$20.00 per net ton F. O. B. shipping point for Colona (Bell type) Thread Protectors in all sizes—both inside and outside protectors—from 2" to 16" inclusive.

If you have or can secure a carload of either inside or outside protectors, or both, wire us collect immediately, and our Purchase Order with shipping instructions will go forward to you at once.

If more convenient, you can jot your reply in the space below and return this sheet in the postage-free envelope enclosed.

This is a bona fide offer and we mean business. Terms are strictly cash. Let us hear from you—Today.

Very sincerely,

VALLEY STEEL PRODUCTS CO.,

(Signed) F. Corgiat,

FC:MT Purchasing Agent."

22. Mr. Reeder: I offer this Exhibit 19 in evidence.

Mr. Rosenblum: I object to it for the same reasons as the other.

The Court: Overruled.

[fol. 431] 23. Q. That letter is dated January 18, 1939, isn't it? A. Yes, sir.

Mr. Reeder: I offer that in evidence.

Mr. Rosenblum: May I see it? I can't tell whether I object to it or not. Maybe I want it in.

(After examining letter) This very obviously applies to a different product than was shipped in those cars, and is so remote from the time of this transaction that I object to it for that reason.

Mr. Reeder: It goes with the cross-examination of the witness and the credibility of the witness. It also is admissible for other reasons.

The Court: Let me see it. (After examining letter) Very well. Objection overruled.

24. You paid, on an average, in 1937, about forty dollars a ton for thread protectors?

Mr. Rosenblum: I object to that as having no relevancy, what was paid on an average in 1937.

The Court: It may have.

Mr. Rosenblum: On an average, during the year?

The Court:..Objection overruled.

25. Q. You testified before the Commission that in 1936 it ranged from eight to eleven dollars?

Mr. Rosenblum: That is objected to as not having any bearing on any issue before this Court.

Mr. Reeder: I am showing in 1936—that was when the hearing was had before the Commission—he so testified at that time.

Mr. Rosenblum: I don't think it makes any difference, in 1936.

The Court: Overruled.

26. Q. Did you and your partner file with the Interstate Commerce Commission the complaint, which I offered in evidence, and which is attached to our Motion and Plea in Abatement in this case? A. Yes, sir.

Mr. Houts: That is objected to as not bearing upon any issue here.

The Court: Read the question.

(Last previous question read to the Court.)

The Court: Objection sustained.

(Here ensued discussion off the record.)

[fol. 432] Mr. Rosenblum: I offer in evidence Defendants' Exhibit G, and offer to show that, assuming the objection is made and your Honor sustains it, that this case pending before the Interstate Commerce Commission, No. 28215, is set for hearing by the Commission on February 29, 1940, at the County Court House, Cairo, Illinois. We offer that proof for the reason given.

The Court: Objection sustained.

27. Q. Are you able to say, from having heard the testimony in these cases, and from your knowledge of the article involved, whether these items here that were shipped in these cars had any commercial value other than for remelting purposes?

Mr. Reeder: That is objected to, because he is asking this witness for a conclusion. The question is susceptible of proof, without resorting to the conclusion and opinion of the witness.



Mr. Rosenblum: Perhaps I ought to qualify him—

Mr. Reeder: It is ~~not~~ a question for expert testimony. We have shown, and the defendants have admitted by their testimony, that it does have a value. It was not purchased for remelting purposes. It has a value for its original purpose when reconditioned.

Mr. Rosenblum: There is no such admission, and the testimony doesn't show it.

The Court: Objection sustained.

Mr. Rosenblum: May I proceed to qualify him further, or does your Honor think that qualification will be of no help?

The Court: I think not.

Mr. Rosenblum: Have you ever seen a carload of these thread protectors, such as have been described by the witnesses Oliver and Fleischman; have you ever seen such a carload? A. Yes.

Q. Do you know whether such thread protectors have any value other than for remelting purposes?

Mr. Reeder: He is asking the same question. I object to it, if the Court please. He is asking the witness to determine the question that is before the Court.

The Court: Objection sustained.

Mr. Rosenblum: It seems to me, your Honor—I don't want to argue needlessly—that the witness from Pittsburgh, the Pittsburgh Screw and Bolt Company, testified as to that. Why couldn't this witness also testify?

Mr. Houts: He testified to facts.

Mr. Rosenblum: I am asking him if he knows.

Mr. Reeder: You cannot tell this Court that we ever asked any witness whether or not it had value, or asked for a conclusion—we showed what the facts were and it is a question for the Court to determine.

The Court: The objection has been sustained.

[fol. 433] 28. Mr. Reeder: We ask leave to amend so that wherever the word "iron" appears, the words "or steel" be added, so it will read "iron or steel".

Mr. Rosenblum: I object to that, your Honor. The case was tried on the petition, which contained the words and designation iron pipe thread protecting rings. All the witnesses testified they are iron, except one.

Mr. Reeder: No; they testified they are iron or steel, and originally it was difficult to tell whether it was iron or steel. The tariff covers both iron and steel.

The Court: The objection is overruled.

Respectfully submitted,

ROSENBLUM & MELLITZ,  
Attorneys for Appellants.

(Endorsed): No. 11,859, Filed in U. S. Circuit Court of Appeals on September 30, 1940.

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[fol. 435] (Order for Hearing of Motion to Dismiss Appeal at Time of Submission of Appeal.)

United States Circuit Court of Appeals,  
Eighth Circuit.

November Term, A. D. 1940.

Monday, January 27, 1941.

Lester A. Crancer and George B. Fleischman, co-partners, doing business under the firm names of Valley Steel Products Company and Mid-Valley Steel Company, respectively, Appellants,

No. 11,859. vs.

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company, a corporation, Appellees.

This cause came on to be heard this day and the appellees presented their motion to dismiss appellants' appeal. The court ordered that the said motion to dismiss be filed with the clerk of this court and that the appellants

take notice thereof, and that the same be heard at the time of the submission of the appeal to this court.

At Kansas City, Missouri, January 27, 1941.

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[fol. 436] (Order Continuing Hearing of Appeal Over March Term, 1941.)

United States Circuit Court of Appeals,  
Eighth Circuit.

November Term, A. D. 1940.

Monday, January 27, 1941.

Lester A. Crancer and George B. Fleischman, Co-Partners,  
doing business under the firm names of Valley Steel  
Products Company and Mid-Valley Steel Company,  
respectively, Appellants,

No. 11,859. vs.

Frank O. Lowden, James E. Gorman and Joseph B. Fleming,  
Trustees of the Chicago, Rock Island and Pacific  
Railway Company, a corporation, Appellees.

On this day this cause came on to be heard upon the motion of appellants for continuance and suggestions in opposition thereto; Mr. Irl B. Rosenblum appearing for appellants, and Mr. Hale Houts appearing for appellees, and the court having heard and considered the same and being advised,

It is ordered that the hearing of the said appeal be, and the same is, continued over the March term of this court.

At Kansas City, Missouri, January 27, 1941.

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[fol. 339] (Appearance of Counsel for Appellants.)

United States Circuit Court of Appeals,  
Eighth Circuit:

Lester A. Crancer, et al., co-partners, etc., Appellants,  
No. 11859 vs.  
Frank O. Lowden, et al., Trustees, etc.

The Clerk will enter my appearance as Counsel for the Appellants.

IRL B. ROSENBLUM,  
BERNARD MELLITZ,  
CLYDE W. WAGNER,  
Suite 600 Landreth Bldg.,  
320 N. 4th St., St. Louis, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals,  
Nov. 8, 1940.

(Appearance of Mr. Hale Houts and Mr. William S. Hogsett as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

HALE HOUTS,  
WILLIAM S. HOGSETT,  
2900 Fidelity Building,  
Kansas City, Missouri.

(Endorsed): Filed in U. S. Circuit Court of Appeals,  
Nov. 12, 1940.

[fol. 340] (Appearance of Mr. William O. Reeder as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

WM. O. REEDER,  
SULLIVAN, REEDER, FINLEY  
& GAINES.

(Endorsed): Filed in U. S. Circuit Court of Appeals,  
Mar. 11, 1941.

(Order of Submission.)

May Term, 1941.

Thursday, May 8, 1941.

This cause having been called for hearing in its regular order, the same was argued by Mr. Irl B. Rosenblum for appellants and by Mr. Hale Houts for appellees.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein, and the motion of appellees to dismiss the appeal.

[fol. 341]

(Opinion.)

United States Circuit Court of Appeals,  
Eighth Circuit.

No. 11,859.—MAY TERM, A. D. 1941.

Lester A. Crancer and George  
B. Fleischman, co-partners,  
doing business under the firm  
names of Valley Steel Prod-  
ucts Company and Mid-Valley  
Steel Company, respectively,  
Appellants,

vs.

Frank O. Lowden, James E.  
Gorman and Joseph B. Flem-  
ing, Trustees of the Chicago,  
Rock Island and Pacific Rail-  
way Company, a corporation,  
Appellees.

Appeal from the Dis-  
trict Court of the  
United States for  
the Eastern Dis-  
trict of Missouri.

[June 30, 1941.]



Mr. Irl B. Rosenblum (Mr. Bernard Mellitz and Mr. Clyde W. Wagner were with him on the brief) for Appellants.

Mr. Hale Houts (Mr. William O. Reeder and Mr. William S. Hogsett were with him on the brief) for Appellees.

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Before GARDNER and JOHNSEN, Circuit Judges, and COLLET, District Judge.

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COLLET, District Judge, delivered the opinion of the Court.

This appeal is from a judgment in favor of the Trustees of the Chicago, Rock Island and Pacific Railroad Company, and against appellants Lester A. Crancer and George B. Fleischman, co-partners doing business under the firm names of Valley Steel Products Company and the Mid-Valley Steel Company respectively, for shipping charges on steel pipe thread protectors. The case was tried without a jury. At the conclusion of the trial the Court made findings of fact and stated conclusions of law, in writing, and entered judgment in favor of appellees for the sum of \$2,263.47.

The present controversy involves the proper classification of the commodity under the existing tariffs. The shipments, seven car loads, moved from points in Montana, Texas, California and Louisiana where appellants had billed the cars to themselves at St. Louis, Missouri. The billings classified the contents of the cars as "scrap iron" and the tariff charge applicable to that classification was paid. When the shipments arrived at St. Louis, appellees' rate clerk requested the Western Weighing and Inspection Bureau to inspect the contents of the cars. That inspection resulted in a rating of the shipments as pipe fittings. The classification "pipe fittings" included thread or pipe protector rings. The tariff rate on scrap iron being less than the rate on pipe thread protector rings, demand was made upon appellants for the difference on

the tariff. Refusal to comply with that demand resulted in this action.

The grounds upon which appellants seek a reversal are:

1. That the greater weight of the evidence failed to show that the shipments were other than scrap iron having a market or commercial value for remelting purposes only.
2. "That the Court erred in rendering judgment in favor of plaintiffs and against the defendants for additional freight charges on the articles shipped in that said judgment was based upon the use to which said articles were put by the defendants after they had received them from the railroad carriers."
3. That improper evidence of the market value of the pipe protectors was received.
4. That the Court improperly admitted in evidence an opinion of the Interstate Commerce Commission.
5. That the Court should not have proceeded with the trial until a complaint case pending before the Interstate Commerce Commission was determined.

Those questions will be considered in the order stated.

The commodity in question, referred to in various terms such as "pipe protectors", "pipe fittings", "pipe thread protectors", "protecting rings", were found by the trial court to be used "iron pipe thread protecting rings". These articles are used to protect the threads and the ends of pipe from injury in handling or shipment. Appellants are engaged in the business of purchasing the used articles, repairing and re-selling them. All of the shipments were of the used articles which were being sent to appellants' plant at St. Louis. The repairing or reconditioning process consisted in a general way in a patented process of straightening those which were not too badly damaged and refinishing the threads. The remainder were useless except for re-melting. One of the appellants, testifying

on direct examination, indicated that approximately ninety per cent of the articles contained in these shipments could possibly be repaired for use. On cross-examination he stated that approximately sixty per cent were repaired and the remaining forty per cent discarded for remelting. There was other evidence to the same effect. The articles were shipped in open coal cars. The good and bad were co-mingled, were loose in the cars, and none were bound or tied together in any way. The tariff contained a provision that when a number of different articles were co-mingled in a car all should take the rating of the highest classed or rated article in the car.<sup>(1)</sup> The re-classification was based upon the following item of the tariff: "Pipe Fittings:—rings, thread protecting, iron, in packages." Appellants' proof tended to show that the thread protecting rings were made of steel. It is their contention that therefore the commodity did not fall within the classification of "iron" pipe thread protecting rings. Numerous metal objects were elsewhere classified under the heading "Iron or Steel." That heading does not appear above the item "Pipe Fittings" quoted above. There is, however, a tariff provision as follows: "Unless the contrary appears, the word 'iron' wherever used in this classification includes, also, steel; and vice-versa." Another provision of the tariff provided for a ten per cent penalty for shipment of articles such as these loose or uncrated and not in packages. There was no difference in tariff rates on new and on used pipe-protecting rings.

The classification relating to scrap iron provided that it should apply only to iron or steel having value for remelting purposes only.<sup>(2)</sup> At another place in the tariff scrap iron is referred to as follows:

(1) "Except as otherwise provided, when a number of different articles, for which ratings or rates are provided when in straight carloads, are shipped at one time by one consignor to one consignee and destination, in a mixed carload, they will be charged at the straight carload rate (not mixed carload rate) applicable to the highest classed or rated article contained in such mixed carload and the carload minimum weight will be the highest provided for any article in the carload."

(2) "Scrap Iron, Scrap Steel, Borings, Filings or Screenings (Iron or Steel), Minimum Weight 50,000 pounds, also Minimum Weight 75,000 pounds. Stop-over privileges to finish loading, or partly unload do not apply in connection with the rating here named. Ratings on scrap iron or scrap steel apply only on pieces (separate or combined) of iron or steel having value for remelting purposes only."

"IRON OR STEEL.—

Scrap, not copper clad, see Note 9:

In packages, or in pieces weighing each 50 lbs. or over,  
loose, L. C. L.

C. L. min. wt. 40,000 lbs., Rule 24 not to apply

Note 9—Ratings apply on scraps or pieces having value  
for remelting purposes only."

As heretofore noted the shipments here involved were not  
in packages. Neither did the articles weigh 50 pounds or  
over.

The trial court found that the shipments were not of  
scrap iron or steel possessing value only for remelting  
purposes, but were of used "iron pipe thread protecting  
rings". This finding is assailed upon several grounds.

The contention that the articles were steel and not iron  
is answered by the tariff provision heretofore quoted pro-  
viding that unless the contrary appears the word "iron"  
will include "steel" and vice-versa. It is argued that  
the contrary is made to appear by the fact that numerous  
other metal objects are classified under the heading "Iron  
or Steel", which does not appear above the item "Pipe  
Fittings" and that therefore the use of the word "Steel"  
in some instances and its absence in the item "Pipe  
Fittings" indicates that steel articles should not be  
included in the latter item.

The doctrine *expressio unius est exclusio alterius* is not  
one of universal application, but is to be applied only as  
an aid in arriving at intention and should not be followed  
to the extent of overriding a different intent. *Bland v.*  
*Commissioner of Internal Revenue*, 102 F.2d 157. *U. S. v.*  
*Barnes*, 222 U.S. 513. The intent is reasonably clear that  
the word iron included articles made of steel.

The argument is advanced that the finding should be  
set aside because there was no proof that the articles had  
a market of commercial value for any purpose other than  
for remelting. Appellants' evidence showed that these



seven and a great many more carloads of pipe thread protectors were purchased by them for reconditioning purposes. There was substantial evidence that a fairly well established price existed for used pipe thread protectors in the territory where they were available. The finding was not clearly erroneous and hence it may not be set aside. Rule 52 (a) Rules of Civil Procedure; *Borserine v. Maryland Casualty Co.*, 112 F.2d 409.

It is further contended that the finding that the pipe thread protectors did not possess a commercial or market value for remelting purposes only, was based solely upon testimony that appellants purchased the articles for reconditioning purposes and not for remelting purposes. Obviously, if the articles were scrap iron fit for remelting purposes only, their purchase by appellants for another purpose would not change the character of the articles. Nor should one rate be applied to the shipment of an article to be used for one purpose and another rate be applied to the shipment of the same article when it is to be used for another purpose. *Interstate Commerce Commission v. B. & O. Ry. Co.*, 225 U.S. 326. But evidence of the use for which the articles were purchased and the use to which they were actually put was properly considered in determining what they actually were. In addition to the evidence showing the purpose for which appellants purchased the articles and the use to which they were put, there is an abundance of testimony to the effect that the articles were used pipe thread protectors, having an established market value as such, as distinguished from mere scrap iron. If, as in *A. T. & S. F. R. Co., et al. v. U. S. ex rel Sonken-Galamba Co.*, 98 F.2d, 457, it had been conceded that the articles had no commercial value except for remelting purposes, or, as in *I. C. C. v. B. & O. R. Co., supra*, the character of the commodity was uncontroverted, the mere fact that appellants had inadvertently paid more for the articles than they were worth for remelting purposes or purchased them for reconditioning purposes when in fact the articles were actually only scrap iron having a value only for remelting purposes, would not change their con-



ceded value or uncontroverted character. But such is not the present case. Here, both the value of the articles and their character were disputed issues. In fact the determination of those issues was of controlling importance. A preponderance of the evidence supports the finding of the trial court both as to the value of the articles and their character.

The evidence is uncontroverted that the major portion of each car load of the shipments involved were used pipe thread protecting rings and were shipped loose and commingled in the cars. As heretofore demonstrated the proof justified the classification of the major portion of each shipment as pipe fittings consisting of used iron pipe thread protecting rings and not as scrap iron having a value for remelting purposes only.

The Tariff heretofore quoted in the margin provided that when articles were shipped in a mixed carload the classification applicable to the highest classed or rated article in the car should apply. The entire shipments were therefore properly classified as pipe fittings consisting of used iron pipe thread protecting rings, and the Tariff applicable thereto was properly applied with a ten per cent penalty for shipment loose, uncrated and not in packages.

Appellants' contention that improper evidence of the market value of the pipe thread protectors was admitted is apparently directed to the admission of the testimony of the witness Perry as to the market value of used pipe thread protectors. It is now asserted that the witness was not qualified and should not have been permitted to testify on the subject of market value. The record discloses that there was no objection to the testimony, and that if there had been an objection to his qualification, it should have been overruled.

It is asserted that the trial court improperly admitted in evidence an opinion of the Interstate Commerce Commission. The opinion was reported in 223 I. C. C. at page

375. The conclusion stated by the Commission is quoted in the margin.<sup>(5)</sup> The objection was:

"\* \* \* that it has absolutely no probative value in this case at all. It is not determinative of this case; it is not conclusive of this case. It is not even persuasive in this case."

Later the additional objection was made that the decision of the Interstate Commerce Commission was treated as being *res adjudicata*. As the quoted portion of the opinion indicates, the opinion dealt with a complaint made to the Interstate Commerce Commission by these appellants in 1937 concerning the reasonableness of the application of existing tariffs to used pipe thread protectors.

Since the case was tried without a jury, we can see no possible prejudice to appellants by the consideration of the opinion of the Commission by the Court as evidence, rather than by an examination of the same opinion in his library. There is no suggestion that the latter course would have been improper. The trial court did not treat the opinion as being *res adjudicata*. There was no error in calling it to the Court's attention.

Appellants' last contention is that the Court should not have proceeded with this trial because there was pending at the time a proceeding before the Interstate Commerce Commission involving the reasonableness of the rates on used pipe thread protectors. The mere statement of the question suggests the answer. The reasonableness of the rates was not an issue in this case. The issue was one of classification and the application of the existing tariffs in accordance with what the facts disclosed the commodity actually was. "Until changed the tariffs bound both carriers and shippers with the force of law." *Lowden v. Simonds, etc., Grain Co.*, 306 U.S. 516, 1 c. 520. Even if, as indicated by counsel in oral argument, the Interstate Commerce Commission determined that the existing rates pre-

(5) "We find that the scrap-iron rates collected on the shipments described were inapplicable; that the applicable rates were the class or commodity rates on pipe fittings, plus 10 per cent thereof when loaded loose or at random, and that the applicable rates are not shown to have been or to be unreasonable. The complaint will be dismissed." *Crawser, et al. v. Abilene & Southern Railway Co.*, 223 I. C. C. 375. Modified in immaterial detail, 225 I. C. C. 319.

scribed on used pipe thread protectors was unreasonable, fixed another rate therefor, and granted reparation rights, this action does not fail. *Lowden v. Simonds, etc., Grain Co., supra*. There was no administrative problem involved, the determination of which is committed to the Interstate Commerce Commission, hence the case of *General American Tank Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, and others of similar import, are inapplicable.

The cause having been considered on the merits appellees' motion to dismiss the appeal may be considered as overruled.

No error appearing the judgment is affirmed without prejudice to such rights as appellants may have or become entitled to for reparation.

[fol. 350]

(Judgment.)

United States Circuit Court of Appeals,  
Eighth Circuit.

May Term, 1941.

Monday, June 30, 1941.

Lester A. Crancer and George B. Fleischman, co-partners,  
doing business under the firm names of Valley Steel  
Products Company and Mid-Valley Steel Company,  
respectively, Appellants,

No. 11859. vs.

Frank O. Lowden, James E. Gorman and Joseph B. Fleming,  
Trustees of the Chicago, Rock Island and Pacific  
Railway Company, a corporation.

Appeal from the District Court of the United States for  
the Eastern District of Missouri.

This cause came on to be heard on the transcript of the  
record from the District Court of the United States for  
the Eastern District of Missouri, and on the motion of  
appellees to dismiss the appeal, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the said motion to dismiss the appeal, be, and the same is hereby, denied.

It is further ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs but without prejudice to such rights as appellants may have or become entitled to for reparation.

And it is further ordered by this Court that Frank O. [fol. 351] Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company, a corporation, have and recover against Lester A. Crancer and George B. Fleischman, co-partners, doing business under the firm names of Valley Steel Products Company and Mid-Valley Steel Company, respectively, the sum of Twenty Dollars for their costs herein and have execution therefor.

June 30, 1941.

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(Application for Stay of Mandate.)

Come now Appellants and petition this Honorable Court for a stay of mandate, and for grounds for said application Appellants state that they desire to file their application for a writ of certiorari to the Supreme Court of the United States and require additional time in which to prepare said writ.

ROSENBLUM & MELLITZ,  
Attorneys for Appellants.


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State of Missouri,  
City of St. Louis—ss.:

Irl B. Rosenblum, of lawful age, being first duly sworn on his oath states that he is Attorney for the Appellants in the above-entitled matter, and as such is authorized to make this affidavit; that the above and foregoing application for stay of mandate has not been made for purposes of delay but is made for the bona fide purpose of obtaining additional time in which to prepare the record and

[fol. 352] application for writ of certiorari to the United States Supreme Court in the above-entitled cause.

• IRL B. ROSENBLUM.

Subscribed and sworn to before me this 11th day of July, 1941. 

My commission expires 12-24-1941.

S. D. TRUE,  
Notary Public.

(Seal)

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 12, 1941.


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(Order Staying Issuance of Mandate.)

May Term, 1941.

Monday, July 14, 1941.

• On Consideration of the motion of Appellants for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

July 14, 1941. 

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[fol. 353] (Praecipe for Transcript for Supreme Court, U. S.)

To: E. E. Koch, Clerk:

Appellants request that you do not include in your record to be made for certiorari to the Supreme Court of the United States:



- a. Appellants' motion for continuance.
- b. Appellees' motion to dismiss.
- c. Appellees' suggestions in opposition to motion for continuance and in support of motion to dismiss.

ROSENBLUM & MELLITZ,

Attorneys for Appellants.

(Endorsed): Filed in U. S. Circuit Court of Appeals,  
Jul. 18, 1941.

[fol. 354]

(Clerk's Certificate.)

United States Circuit Court of Appeals,  
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the precept of counsel for appellants, in a certain cause in said Circuit Court of Appeals wherein Lester A. Crancer and George B. Fleischman, co-partners, doing business under the firm names of Valley Steel Products Company and Mid-Valley Steel Company, respectively, were Appellants, and Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company, a Corporation, were Appellees, No. 11859, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this eighteenth day of July, A. D. 1941.

(Seal)

E. E. KOCH,  
Clerk of the United States  
Circuit Court of Appeals,  
Eighth Circuit.

[fol. 355] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8446)

**No 505**

Clerk - Supreme Court, U. S.

FILED

AUG 11 1941

CHARLES CLARKE WHITLEY  
CLERK

IN THE  
**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1941.

**LESTER A. CRANCER and GEORGE B. FLEISCHMAN, Co-  
Partners, Doing Business Under the Firm Names of VALLEY  
STEEL PRODUCTS COMPANY and MID-VALLEY STEEL  
COMPANY, Respectively,**

Petitioners and Appellants Below,

vs.

**FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B.  
FLEMING, Trustees of the Chicago, Rock Island and Pacific  
Railway Company, a Corporation,**

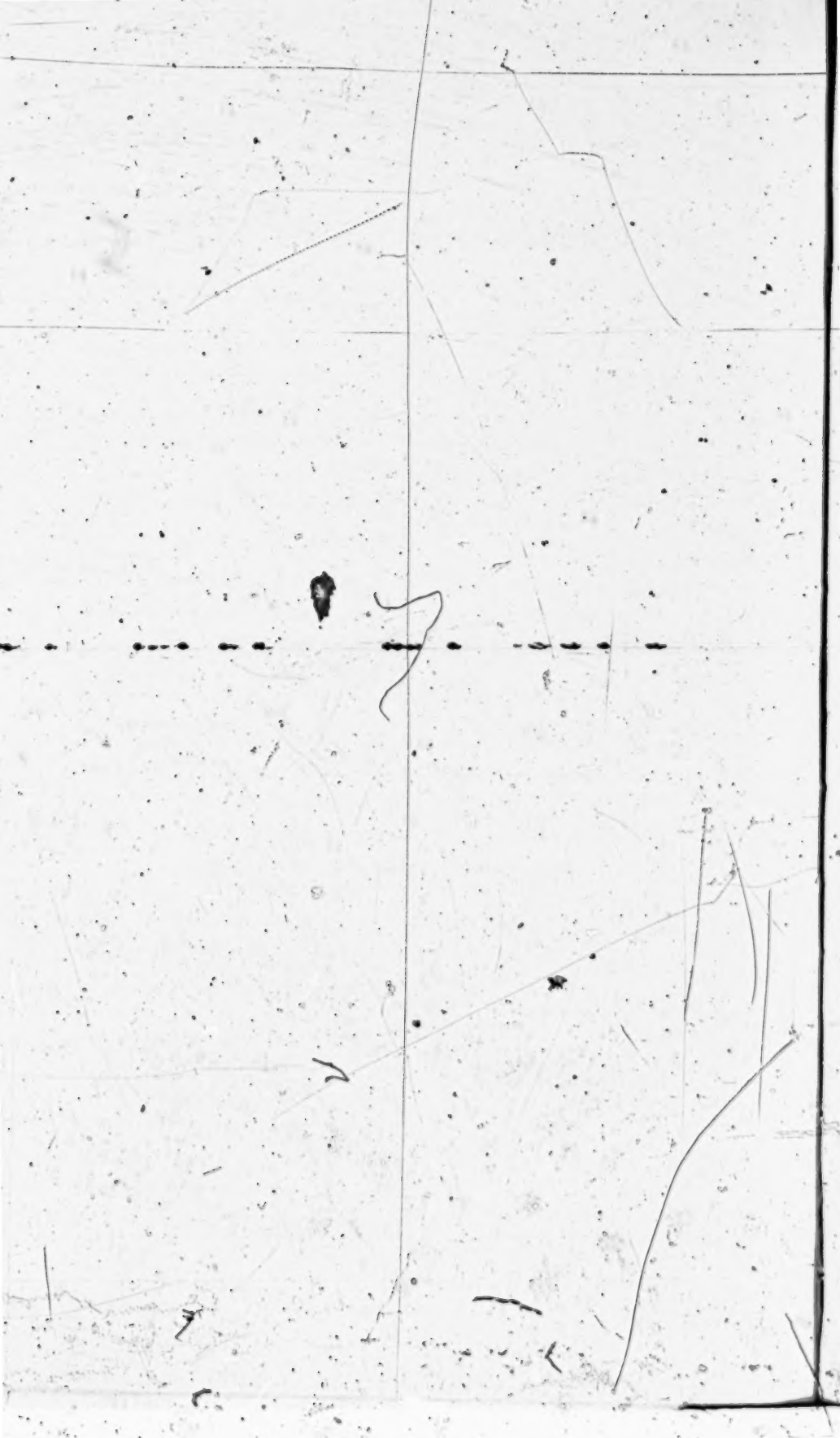
Respondents and Appellees Below.

**PETITION FOR WRIT OF CERTIORARI**

**To the United States Circuit Court of Appeals  
for the Eighth Circuit,  
and**

**BRIEF IN SUPPORT THEREOF.**

**IRL B. ROSENBLUM,  
BERNARD MELLITZ,  
CLYDE W. WAGNER,  
320 North Fourth Street,  
St. Louis, Missouri,  
ABRAHAM B. FREY,  
Federal Commerce Trust Bldg.,  
St. Louis, Missouri,  
Attorneys for Petitioners.**



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III. The District Court should not have proceeded with the trial of this cause while there was a complaint and proceeding pending before the Interstate Commerce Commission, in which the very rates sought to be collected by Respondents in the instant suit were attacked as being unreasonable and discriminatory..... 17

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#### Cases Cited.

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IN THE  
**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1941.

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**LESTER A. CRANCER and GEORGE B. FLEISCHMAN, Co-  
Partners, Doing Business Under the Firm Names of VALLEY  
STEEL PRODUCTS COMPANY and MID-VALLEY STEEL  
COMPANY, Respectively,**

**Petitioners and Appellants Below,**

**vs.**

**FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B.  
FLEMING, Trustees of the Chicago, Rock Island and Pacific  
Railway Company, a Corporation,**

**Respondents and Appellees Below.**

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**PETITION FOR WRIT OF CERTIORARI.**

To the Honorable Harlan F. Stone, Chief Justice of the  
Supreme Court of the United States, and the Associate  
Justices of the Supreme Court of the United States:

Your Petitioners respectfully show:

**I.**

**SUMMARY STATEMENT OF THE MATTER  
INVOLVED.**

This is an action at law brought in the United States  
District Court for the Eastern Division of the Eastern  
Judicial District of Missouri by Respondents against Pe-  
titioners for the recovery of additional freight charges on  
shipments of commodities known as "pipe thread protec-  
tors" beyond that which Petitioners had previously paid.  
The trial was by court without a jury, and a judgment was

rendered in favor of the Respondents and against the Petitioners in the sum of \$2,263.41. An appeal from said judgment was taken by the Petitioners to the United States Circuit Court of Appeals for the Eighth Circuit, which confirmed the judgment of the District Court.

The Petitioners claimed in the trial before the Judge of the District Court that they had paid the full freight charges on the commodities shipped, while the Respondents claimed that they were entitled to additional freight charges. The grounds upon which the Petitioners sought a reversal in the Circuit Court of Appeals (R. 342), so far as it may be material here, were:

(1) That the District Court erred in rendering judgment in favor of the Respondents and against the Petitioners for such additional freight charges, in that said judgment was based upon the use to which the articles were put by the Petitioners after they had received them from the respondent railroad carriers.

(2) That the District Court improperly admitted in evidence an opinion of the Interstate Commerce Commission on the theory that said opinion was evidence of what the correct tariff rate should be on the commodity in question, in the suit at bar.

(3) That the District Court should not have proceeded with the trial of this cause while there was a complaint and proceeding pending before the Interstate Commerce Commission, in which the very rates sought to be collected by Respondents in the instant suit were attacked as being unreasonable and discriminatory.

The commodities shipped in the cars mentioned in the suit of Respondents were described as "scrap pipe thread protectors," and the Petitioners had previously paid the so-called scrap iron rate on these commodities. Respond-

ents sought in their petition filed in the District Court to recover from Petitioners the same rate on these discarded thread protectors as was charged by the railroad Respondents for the shipment of new thread protectors.

A description of the method by which the thread protectors were gathered from scrap iron dealers and scrap yards and the method by which they were remanufactured by the Petitioners in their plant at Cairo, Illinois, is found in the Record, pages 199 to 210. Forty per cent of the thread protectors which were shipped from the oil fields and the scrap yards to the Petitioners had to be thrown out altogether, as they were not even fit for remanufacture (R. 237).

As the Record discloses (R. 199-210), it was necessary to remanufacture every single one of these thread protectors before they could be resold by the Petitioners. The record is full of testimony as to the use to which the Petitioners put the articles shipped, and this testimony was all objected to by the Petitioners (R. 44, 91, 127, 218, 219, 220, 247, 248).

The District Court must have based its judgment upon the theory that the commodities shipped in the cars in question were not scrap, because they were not used as scrap for remelting purposes only. This is clearly disclosed by the statement of the District Court at the conclusion of the case and the oral argument (R. 292):

"The Court: There is no doubt in my mind at all in this matter. I do not think this is scrap iron. I do not believe that they are entitled to that rate and the course of dealing, over a long period of time, shows that, as a matter of fact, it never was used in that way."

After making this statement the Court advised the plaintiffs to submit findings of fact and conclusions of law,



and immediately rendered its judgment in favor of the plaintiffs.

Again, Petitioners objected to the introduction of an opinion of the Interstate Commerce Commission in the case of Crancer et al. v. Abilene & Southern Railway, 223 I. C. C. 375, decided August 6, 1937 (R. 190-195). Petitioners objected in the lower court to the introduction of this opinion for the reason that it had no probative value and that it was not determinative of the issues in the case at bar, and that it was not even persuasive, and that it was not res judicata of the issues before the District Court. This point was vigorously argued in the Court of Appeals, but the appellate court sustained the ruling of the District Court in admitting this opinion in evidence.

The opinion was admitted in evidence upon the theory that the decision was evidence of what the correct tariff rate should be for the articles shipped by the Petitioners.

Finally, Petitioners took every step possible to prevent the trial of the case in the District Court, for the reason that there was pending before the Interstate Commerce Commission a proceeding in which the very rates sought to be collected by the Respondents in their suit in the District Court were attacked as being unreasonable and discriminatory. This proceeding was called to the attention of the District Court by the defendants' motion to stay proceedings and plea to the jurisdiction and plea in abatement (R. 14), to which there was attached a copy of the complaint then pending before the Commission (R. 217-224).

On December 22, 1939, the case was continued by the District Court, on application of the Petitioners, to the March Term, 1940, for the reason of the pendency of the complaint and proceedings before the Commission, but



Respondents filed a motion to set aside this continuance (R. 13), asserting that the Petitioners were delaying the matter before the Commission and indefinitely postponing the same. Without proof of such assertion of such delay, the District Court set aside the continuance and set the case for trial and overruled the Petitioners' motion to stay proceedings (R. 24).

Petitioners, at the time of the trial before the District Court, again raised the question of that Court's right to try this case in view of the pendency of the complaint and proceedings before the Interstate Commerce Commission to determine the reasonableness of the rates involved (R. 32, 33, 34).

Petitioners also offered in evidence a copy of the complaint before the Commission, which was cause No. 28,215 (R. 17); and offered proof to show that the hearing before the Commission had been set in Cairo, Illinois, for February 29, 1940 (R. 24), thus completely negating the assertion by Respondents that the Petitioners were delaying the matter before the Commission and indefinitely postponing the same.

Petitioners also pointed out to the District Court that in a companion case pending before another Judge of the same District Court, to wit, Judge Charles B. Davis, the same motion to stay proceedings had been had, and although Judge Davis had not sustained the motion, he had filed a memorandum in which he stated, "In view, however, of the matters set forth by the defendants, we are of the opinion that if the Interstate Commerce Commission is willing to reopen the investigation of the rates in controversy, the trial of this matter should be postponed" (R. 33).

The said offer in evidence and offer of proof was excluded by the trial judge (R. 34-35). However, Exhibit

"G" was permitted in evidence (R. 278-280), which clearly showed that the matter was set for hearing on February 29, 1940, at Cairo, Illinois, before an examiner of the Interstate Commerce Commission by virtue of an order of that Commission, dated February 20, 1940.

The trial of the instant cause by the District Court was held from January 31, 1940, to February 7, 1940, despite the pendency of the complaint before the Commission. Under these circumstances, it is Petitioners' contention that the District Court had no right to proceed with the trial of the cause, and proceedings should have been stayed until the Commission had passed upon the reasonableness of the rates sued upon by the Respondents. As a matter of fact, the Interstate Commerce Commission, by its decision of February 18, 1941, through Division 3 thereof, 243 I. C. C. 509, Advance Sheet, decided that the rates which formed the basis of the District Court's judgment were unreasonable. This decision of the Commission is printed in Appendix A attached hereto and made a part hereof, to which reference is specifically made. The Circuit Court of Appeals, in its opinion (R. 348-349) overruled this contention of the Petitioners.

## II.

### **STATEMENT OF JURISDICTION.**

The date of the opinion of the United States Circuit Court of Appeals of the Eighth Circuit is June 30, 1941.

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 347, Title 28, United States Code Annotated, which provides:

"(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any

party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

### III.

#### **QUESTIONS PRESENTED.**

The questions presented are set forth in Summary Statement of the Matter Involved under I hereinabove.

### IV.

#### **REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.**

The reasons relied on for the allowance of this writ are that the Circuit Court of Appeals, by its opinion (R. 341) has decided a federal question in a way in conflict with applicable decisions of this Court, which are fully and completely set forth in our brief. Said decisions are as follows:

Interstate Commerce Commission v. Delaware, Lackawanna & Western Railway, 220 U. S. 235, 31 S. Ct. 392;

Interstate Commerce Commission v. B. & O. Railroad Co., 225 U. S. 326, 32 S. Ct. 742;

Great Northern Railway Co. v. Merchants et al., 259 U. S. 285, 42 S. Ct. 477;

Texas Pacific Railway Co. v. American Tie & Timber Co., 234 U. S. 138, 34 S. Ct. 885;

Robinson v. B. & O. Railroad Co., 222 U. S. 506, 32 S. Ct. 114;

General American Tank Corp. v. El Dorado Terminal Co., 308 U. S. 422, 60 S. Ct. 325.

Wherefore, your Petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 11,859, Lester A. Crancer and George B. Fleischman, Co-partners, doing business under the firm names of Valley Steel Products Company and Mid-Valley Steel Company, respectively, Appellants, v. Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island & Pacific Railway Company, a corporation, Appellees, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated August 1, 1941.

LESTER A. CRANCER and GEORGE  
B. FLEISCHMAN, co-partners doing  
business under the firm names of Val-  
ley Steel Products Company and Mid-  
Valley Steel Company, respectively,  
Petitioners.

IRL B. ROSENBLUM,  
BERNARD MELLITZ,  
CLYDE W. WAGNER,  
ABRAHAM B. FREY,

Counsel for Petitioners.



## BRIEF AND ARGUMENT.

The jurisdiction of this Supreme Court of the United States is invoked on the grounds that the opinion of the Eighth Circuit Court of Appeals decided a federal question in a way which is in conflict with the applicable decisions of this Court hereinafter set forth. The statement of this case has been set forth in full in the preceding petition for writ of certiorari under I, entitled "Summary Statement of the Matter Involved."

### SPECIFICATION OF ERRORS.

I. That the Circuit Court of Appeals erred in sustaining the judgment of the District Court in favor of the Respondents and against the Petitioners for additional freight charges in that said judgment was based upon the use to which the articles were put by the Petitioners after they had received them from the respondent railroad carriers.

II. That the Circuit Court of Appeals erred in sustaining the District Court, which improperly admitted in evidence an opinion of the Interstate Commerce Commission on the theory that said opinion was evidence of what the correct tariff rate should be on the commodity in question in the suit at bar.

III. That the District Court should not have proceeded with the trial of this cause while there was a complaint and proceeding pending before the Interstate Commerce Commission, in which the very rates sought to be collected by Respondents in the instant suit were attacked as being unreasonable and discriminatory.



## ARGUMENT.

### I.

The first assignment of error is based upon the fact that the District Court (in its judgment in favor of Respondents and against Petitioners based said judgment for additional freight charges upon the use to which the articles were put by Petitioners after they had received them from the Respondent railroad company. This is evident from the testimony admitted over the objection of Petitioners (R. 91, 127, 220, 247, 248, 292). The District Court, as pointed out in our summary statement in the beginning of this petition for writ of certiorari, clearly indicated that the theory upon which he rendered judgment was that the use to which Petitioners put the commodities shipped was a controlling factor in his mind. We cite again this statement by the Court, "There is no doubt in my mind at all in this matter. I do not think this is scrap iron. I do not believe that they are entitled to that rate and the course of dealing, over a long period of time, shows that, as a matter of fact, it never was used in that way" (R. 292).

It was clearly pointed out that when the scrap thread protectors were discarded and used only as scrap and shipped to a mill to be remelted, they bore the scrap iron rate (R. 247-248). On the other hand, when these thread protectors were shipped to the Petitioners' plant and remanufactured by them, the decision of the District Court held that they should bear a different and higher rate, the same as if the articles were brand new. Such practice is definitely forbidden by Section 2, Title 49, United States Code Annotated. That section expressly prohibits discrimination between shippers based on the use to which the article is put when it is received by the shipper.

Every single authority on this subject establishes the rule with uniform weight.

In the case of *Interstate Commerce Commission v. Delaware, Lackawanna & Western Railroad*, 220 U. S. 235, 31 S. Ct. 392, the Interstate Commerce Commission declared that the railroads could not refuse carload rates to forwarding agents who had combined many shipments into carload lots. Mr. Chief Justice White, in asserting that the order of the Commission was correct, said:

"The contention that a carrier, when goods are tendered to him for transportation, can make the mere ownership of the goods the test of his duty to carry, or, what is equivalent, **may discriminate in fixing the charge for carriage**, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods, is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers, as to demonstrate the unsoundness of the proposition by its mere statement \* \* \* "It is not open to question that the provisions of Section 2 of the Act to regulate commerce were substantially taken from Section 90 of the English Railway Clauses Consolidation Act of 1845, known as the 'equality clause' \* \* \* Certain also it is that, at the time of the Act to Regulate Commerce, that clause in the English act had been construed as only embracing circumstances concerning the carriage of the goods, and not the person of the sender; or, in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated \* \* \* And it may not be doubted that the settled meaning which was affixed to the English equality clause at the time of the adoption of the Act to Regulate Commerce applies in construing the second section of that act."

The most emphatic and pertinent case before the Commission with reference to the matters here discussed is that of Wrought Washer Manufacturing Company v. Pere Marquette Railway Co., 136 I. C. C. 703. In that proceeding there was involved the question of the lawfulness of the rates, as stated at page 704 of the report, on "pieces of iron or steel constituting the waste, erop ends, or trimmings accumulated at steel mills as an incident to the manufacture of prime sheets, plates, strips and similar products. In other instances, the shipments received by complainant consisted of material obtained by dismantling boilers, floor plates, etc. Complainant, after reheating and rerolling some of these pieces and shearing or sorting others, utilized them by stamping therefrom iron or steel washers." The Commission, in discussing this situation, said:

"Aside from this contention, however, complainant urges that it is the practice of defendants, in interpreting this definition and in determining whether they will apply the scrap iron rates on a particular shipment, to inquire into the character, business and equipment of the consignee; so, that if the consignee happens to be a **steel mill** equipped to **remelt** the material the scrap iron rate is applied, but if the consignee has no remelting facilities and puts the material to some other use which does not entail remelting the scrap iron rate is not applied even though the material is identical in kind. The evidence introduced by complainant strongly supports its contention in this respect and is not controverted by defendants. **Such a method of determining the rates to be applied is clearly indefensible.** There can be but one applicable rate on like shipments between like points."

"Apparently defendants' position is that no single general definition or description can be devised to cover all of the kinds of iron and steel received by complainant, and that since scrap iron, as defined in the

tariffs, is generally accorded the same rates as billets, any finding which would accord reasonable rates on shipments of the character under consideration would virtually eliminate from the definition of scrap iron the phrase 'having value for remelting purposes only.'

"We have previously adverted to the unlawful manner in which apparently this definition is being applied by defendants and the **necessity for a revision** thereof in order to more accurately describe the traffic intended to be covered. The fact that such a revision may be attended with difficulty is no justification for denying to complainant reasonable rates." (Emphasis ours.)

In the case of *Zimmerman, Wells et al. v. Director General*, 122 I. C. C. 199, the Commission set forth its ruling in the following language:

"We have consistently found that rates shall not be based upon the use which is to be made of a commodity. In considering a somewhat analogous tariff item it was held that old rails shown under the heading 'scrap iron and scrap steel, including' were entitled to the rate in that item **even though the rails were to be used further**. *Midcontinent Equipment & Machinery v. M. Railway Co.*, 88 I. C. C. 217."

A decision which is most appropriate to the issues involved and which we feel decides the issue here is that of *Interstate Commerce Commission v. B. & O.*, 225 U. S. 326, 32 S. Ct. 742. The facts in that case may be simply stated. The railroad charged themselves lower rates for coal intended for railway consumption than they charged other shippers for coal intended for their own ordinary commercial consumption. The opinion of Mr. Justice McKenna, with careful and logical reasoning, holds that section 2 of the Act directly and explicitly prohibits the application of tariff rates based upon the use to which the commodities are later put. The Court, in arriving at



its conclusion, considered whether there were differences in the traffic of fuel coal which distinguished it from traffic in commercial coal and which, as contended by the railroad company, made it traffic dissimilar in circumstances and conditions, or whether the opposite was true. It held that the railroads would be compelled to pay the same rate as other users of coal. The Court asks the question: "Do the circumstances and conditions in this case give a greater power of discrimination and justify the lower charge to railroad-fuel coal?" and answers this question as follows:

"Once depart from the clear directness of what relates to the carriage only and we may let in considerations which may become a cover for preferences. May a carrier look beyond the service it is called upon to render to the attitude and interest of the shippers before or their attitude and interest after, transportation? It must be kept in mind that it is not the relation of one railroad to the other with which we have any concern, but the relation of a railroad to its patrons, who are entitled to equality of charges."

Now, if it is improper and illegal for a carrier to charge a different rate if coal is shipped to it from the rate which it charges on coal to commercial users, then certainly it must be admitted that it is equally improper and unlawful for the carrier to charge one rate to the defendants because they salvage some of the material and another rate to the remelting mill which remelts the material. For, in its essence, does not the material which was remelted go to produce another article in much the same fashion that the process of salvage operation used by the defendants produces an article different from the article when it was received by the defendants in its scrap form?

Since the judgment of the Court was so clearly based upon the use to which the articles shipped were put after



they were received and remanufactured by the defendants, the judgment is erroneous under the authorities and ought to be reversed.

II.

The decision of the Circuit Court of Appeals was further erroneous in that it sustained the trial court in permitting a decision of the Interstate Commerce Commission to be introduced in evidence, to wit, Crancer et al. v. Abilene & Southern Railway, 223 I. C. C. 375 (R. 190).

Petitioners objected to the introduction of this Interstate Commerce Commission opinion for the reason that it had no probative value and was not determinative of the issues of the case at bar. The opinion of the Interstate Commerce Commission very clearly related to cars of thread protectors ~~other than those which were in issue~~ in the trial at bar, and there was never any showing in any place in the record that the cars considered by the Commission in 223 I. C. C. 375 contained articles of the same nature, character and description, as were contained in the cars mentioned in the suit at bar. Upon being pressed by attorneys for the Petitioners to state the theory upon which the decision was offered (R. 195) counsel for the Respondents stated it as follows: "It is evidence of what the correct tariff rate is." The District Court overruled Petitioners' objection and permitted the opinion to stand as evidence of the correct tariff rate for the commodities mentioned in the suit at bar.

Obviously the District Court would have been bound to have been influenced by this decision of the Interstate Commerce Commission, and must have believed that the decision constituted a binding precedent as to the contents and freight rates applicable thereto of the cars in question in the suit at bar.

The case of *Sonken-Galamba Corp. v. Atchison*, 28 Fed. Sup. 456, discusses the question of res judicata as it may apply to similar articles which are the subject of different lawsuits. In the *Sonken-Galamba* case Judge Otis was asked to render a summary judgment by the plaintiff, who was suing railroad companies for failure of the carriers to transport at the scrap iron rate what the plaintiffs claimed was scrap iron.

The plaintiffs, in their motion for summary judgment, pointed out that in previous lawsuits in the nature of mandamus proceedings, the material involved had been adjudged to be carried at the scrap iron rate. Judge Otis, however, ruled that the claim for damages brought by the plaintiffs in this case arose from the failure of railroad companies to move other material under the scrap iron rate. The Judge denied the motion for a summary judgment on the theory that the findings of the other courts in a mandamus proceeding was not res judicata in the damage suit pending before him.

He pointed out that the only material issue of fact involved in the mandamus suit was whether what was tendered for shipment were pieces of iron and steel of value only for remelting purposes. The opinion makes clear that the doctrine of res judicata can only apply where the identical thing is in issue between the identical parties.

Judge Otis discussed the issue as follows:

"There have been hundreds, perhaps thousands, of cases involving freight undercharges and overcharges. Each one of these cases concerned what rate a particular shipment should pay, involved a determination as to what the commodity shipped was. So far as our research has revealed, it has never been so much as contended that a judgment in one of these cases was res adjudicata in a subsequent case between the same parties involving a shipment of an allegedly similar

commodity. We must conclude that the opinion of the bar has been against plaintiffs' theory."

Thus we see that in the case at bar the opinion of the Interstate Commerce Commission (R. 190) should never have been admitted in evidence, had no probative value, and might have influenced the Court to have given a judgment based on the theory of counsel for respondents that the former opinion of the commission established what the correct tariff rate should be on the articles involved in this suit.

### III.

It is finally urgently contended that the District Court had no right to proceed with the trial of this case when the very rates which the Respondents were attempting to collect were claimed in a proceeding pending before the Interstate Commerce Commission to be unjust and unreasonable.

On March 10, 1939, Petitioners filed with the Interstate Commerce Commission a complaint (R. 17-24), to which the Respondents were parties, charging that the rates which the Respondents were seeking to collect in the suit before the District Court were unreasonable and unjust. This complaint before the Commission antedated the suit at bar, which was filed on March 16, 1939 (R. 10 and 11). By every means available to Petitioners, including an unsuccessful effort to obtain a writ of prohibition out of the Circuit Court of Appeals for the Eighth Circuit, Petitioners sought to have the District Court stay its proceedings until the reasonableness of the rates sought to be collected could be determined by the Commission.

Every decision of which we have any knowledge holds that it is mandatory upon the District Court not to proceed with the trial of a case when the reasonableness of the

rates involved are a matter pending before the Interstate Commerce Commission. The reason for this rule is made obvious in the case at bar, because it would naturally be a waste of time for the District Court to try a case and decide that the defendants would have to pay a rate which the Commission later determined was an unreasonable rate, and, therefore, could not be collected by the railroads.

As a matter of fact, in the case at bar the very situation occurred which must have been in the minds of the writers of all the opinions, which we are about to set forth. The Commission decided that the rates sought to be collected by the railroad plaintiffs in the case at bar are unreasonable, as indicated in their decision, which is appended hereto as Appendix A.

Respondents gave the District Judge, as a reason for their great hurry in this case, the fact that Petitioners were delaying the hearing before the Commission. This was not true; and, further, Petitioners offered to prove (R. 24) that the matter was set for hearing before the Interstate Commerce Commission just a few weeks later than the date of this cause in the District Court. Petitioners do not understand the reason for the terrific pressure and haste to get this case at trial. There are other cases pending of a like nature in other divisions of the District Court of Missouri in St. Louis, and every single one of these other cases has been held in abeyance subject to the outcome of the proceeding before the Commission.

Our statement quoted Judge Charles B. Davis' memorandum (R. 33) in which he very clearly said that the trial of the similar case before him should be postponed. We think that that situation should have resulted in the case at bar as a matter of comity between the Courts of this country and the Interstate Commerce Commission. On this issue the authority of the Supreme Court of the United



States is uniform. The first opinion on this subject is that of Justice Brandeis in *Great Northern Railway Co. v. Merchants et al.*, 259 U. S. 285, 42 S. Ct. 477. The learned Justice there declares the rule to be:

“(2, 3) Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters; and uniformly can be secured only if its determination is left to the Commission. However, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable, and such acquaintance is commonly to be found only in a body of experts \* \* \*.”

Of like effect is *Texas & Pacific Railway Co. v. American Tie & Timber Co.*, 234 U. S. 138, 34 S. Ct. 885, and *Robinson v. B. & O. Railroad Co.*, 222 U. S. 506, 32 S. Ct. 114.

The last decision concerning this vital matter is to be found in the case of *General American Tank Corp. v. El Dorado Terminal Co.*, 208 U. S. 422, 60 S. Ct. 325. Justice Roberts here held that a District Court had jurisdiction of the subject matter of the action, but should not have pro-



ceeded to adjudicate it until the Interstate Commerce Commission had passed upon the reasonableness and legality of the practices of the parties, and the Court says:

"When it appeared in the course of the litigation that an administrative problem committed to the Commission was involved, the Court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal but as in *Mitchell Coal & Coke Co. v. Pennsylvania Railroad Company*, supra, the cause should be held pending the conclusion of an appropriate administrative proceeding."

The opinion of the Circuit Court of Appeals attempts to answer Petitioners' contentions by stating that the reasonableness of the rates was not an issue in the case at bar. That, of course, is correct, but such a statement merely begs the question herein involved. The reasonableness of the rates was an issue in the complaint pending before the Interstate Commerce Commission. That complaint had been filed before the instant suit at bar had been filed in the District Court, and the point here urgently made is that the District Court, in the light of the decisions above quoted, had no right to proceed with the trial of the cause until the Commission had determined whether or not the rates sued upon were reasonable. It is interesting in this connection to note the final paragraph of the opinion of the Circuit Court of Appeals, which is as follows: "No error appearing, the judgment is affirmed without prejudice to such rights as Appellants may have or become entitled to for reparation." The Court in this last paragraph recognizes that if the Commission's final decision declares the rate to be unreasonable, that the judgment of the District Court in effect might be set aside because it would be excessive. This gives added emphasis, if such be necessary, to the contention that the orderly administration of justice

requires the federal courts to wait with a suit for the collection until those rates have been determined by the Commission to be reasonable or otherwise.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision.

IRL B. ROSENBLUM,  
BERNARD MELLITZ,  
CLYDE W. WAGNER,  
ABRAHAM B. FREY,

Counsel for Petitioners.



**APPENDIX A**

**INTERSTATE COMMERCE COMMISSION**

No. 28215

**VALLEY STEEL PRODUCTS COMPANY, ET AL.,**

v.

**ATCHISON, TOPEKA & SANTA FE RAILWAY  
COMPANY, ET AL.**

243 I. C. 509 (Advance Sheet).

Submitted December 1, 1940. Decided February 18, 1941.

Rates on used pipe-thread protecting rings, in carloads, from points in Louisiana, Texas, Arkansas, California, Montana, New Mexico, Wyoming, and the Province of Alberta, Canada, to St. Louis, Mo., and East St. Louis and Cairo, Ill., found unreasonable. Reasonable rates for the future prescribed and reparation awarded.

Nuel D. Belnap, Robert M. Burchmore, and John S. Burchmore for complainants.

L. P. Day, A. B. Enoch, E. A. Smith, M. G. Roberts, J. I. Bonner, Norman E. White, Robert Thompson, H. H. Larimore, George W. Holmes, and Toll R. Ware for defendants.

Charles Donley for intervener.

**REPORT OF THE COMMISSION.**

Division 3, Commissioners Mahaffie, Alldredge, and Johnson by Division 3:

Exceptions to the report proposed by the examiner were filed by complainants and defendants, and the issues were

argued orally. Our conclusions differ somewhat from those recommended by the examiner.

Complainants are Lester A. Crancer and George B. Fleischman, copartners, doing business under the firm names of Valley Steel Products Company and Mid-Valley Steel Company. By complaint filed March 10, 1939, as amended, they allege that the rates on used and discarded thread protectors from points in Louisiana, Texas, Arkansas, California, Montana, New Mexico, Wyoming, Michigan, and the Province of Alberta, Canada, to St. Louis, Mo., and East St. Louis and Cairo, Ill., were and are unreasonable, unjustly discriminatory, unduly prejudicial, and in violation of section 6 of the Interstate Commerce Act. We are asked to prescribe lawful rates for the future and to award reparation. The Pittsburgh Screw & Bolt Corporation intervened. Rates will be stated in amounts per 100 pounds, and do not include any authorized emergency charges.

Thread protectors are metal rings which are applied to pipe by the manufacturer solely for the purpose of protecting threads on gas and oil well pipe during transportation. They are removed before the pipe is placed in use. Due to the fact that they were thought to have no value, originally they were allowed to lie exposed to the weather for considerable periods, or were buried to prevent injury to cattle. However, in recent years their value has been recognized and they have been handled with more care and are in better condition. Used thread protectors are purchased from oil well companies or scrap dealers located at or near oil and gas fields. They are shipped loose in open-top cars to St. Louis, East St. Louis, or Cairo, where they are sorted for the purpose of determining which ones are fit for reconditioning so that they may be used again for their original purpose. A large percentage of those re-



ceived by complainants are fit to be reconditioned. The remainder are discarded as scrap fit for remelting only. Special tools and machines have been devised for reconditioning used thread protectors.

After the thread protectors have been sorted, those that can be used are immersed in a series of tanks containing acid and hot water rinses for the purpose of removing rust, dirt, grime, and heavy scale. The next operation in the reconditioning process, and stated to be perhaps the most important one, is to make the protectors absolutely round, since many are bent out of line. This is done by placing the protector rings over plugs and inserting them in a 300-ton press. After the rings are made concentric, a special tool is used in a lathe to straighten or reform the threads, provided there is sufficient metal for that purpose. If there is not sufficient metal, or for any other reason it cannot be rethreaded, the protector is then discarded as scrap. The final process consists of screwing the reconditioned protector on a piece of pipe to determine whether it is of exact size. If the size is too far from the exact, the protector will be discarded at that point in the operation.

Prior to 1939, the value of used protectors averaged \$30 per ton at origin. There are two types, one of which has 10 V-shaped threads to the inch. It was replaced early in 1939 by a new type having 8 U-shaped threads to the inch and which is now standard. In 1939, prices ranged from \$10 per ton for the old type to \$85 for the new. The average for the old type was \$25. Reconditioned new-type protectors sell for \$135 to \$140 per ton, and original new-type protectors for approximately \$200 per ton.

During the period July 20, 1936, to November 25, 1939, complainants received 244 carloads of used thread protectors, of which 161 moved from various points in Texas, 33 from Louisiana, 2 from El Dorado, Ark., 20 from

Hobbs, N. Mex., 18 from California, 2 from Gladwin, Mich., 1 from Manville, Wyo., 4 from Montana, and 3 from Canada. Of 237 carloads shown of record, 6 were loaded under 40,000 pounds, 32 from 40,000 to 50,000 pounds, 56 from 50,000 to 60,000 pounds, 54 from 60,000 to 70,000 pounds, 37 from 70,000 to 80,000 pounds, and 52 cars in excess of 80,000 pounds. Some of the latter weighed more than 100,000 pounds. The average weight of the 237 cars was 66,335 pounds.

Under the general heading "Pipe Fittings" rings, iron or steel, for protecting threaded ends of iron or steel pipe, in packages, in carloads, were and are rated fifth class, minimum 36,000 pounds, in western and official territories. On July 10, 1939, the classification was amended by the addition of a note to this item providing that old used thread protecting rings having value only for reconditioning will be accepted loose in carloads. Prior to April 9, 1937, fifth-class rates under the southwestern revision were 40 per cent of the first class rates. On that date fifth class was made 37.5 per cent of first in the Southwest. In many instances commodity rates applied and apply on pipe fittings, in carloads, minimum 46,000 pounds, subject to certain packing requirements. When those requirements were not observed a 10 per cent penalty charge was made.

From origins in Arkansas and Louisiana fifth-class rates apply on thread protectors. Commodity rates are provided generally from points in Texas. Those under consideration range from 23.5 to 36.5 per cent of the corresponding first-class rates. On the shipments from New Mexico, all of which moved from Hobbs, combination rates applied, which were 39.5 per cent of the first-class rate prior to April 9, 1937, and 37.5 per cent after that date. From the California origins commodity rates, approximating 19.3 per cent of first class, apply. On the shipments

from Wyoming and Canada the rates are based on 32.5 per cent of first class, the iron and steel articles basis. From Montana commodity rates, equivalent to 25.7 per cent of first class, apply. Fifth-class rates apply from Michigan.

Complainants contend, however, that the tariffs are so worded that it is difficult to determine just what rates are applicable on thread protectors and in support of that contention they state that various carriers apply different rates to the same commodity under the tariffs. This alleged ambiguous tariff situation is the basis for the allegation of a violation of section 6 of the act, which requires the publication of tariffs which plainly state the rates to be applied for the transportation of property.

On a large number of the shipments under consideration the charges collected were based upon the scrap-iron rates from and to the same points. In another proceeding, Crancer and Fleischman v. Abilene & S. Ry. Co., 223 I. C. C. 375, complainants herein assailed as inapplicable and unreasonable rates sought to be collected on thread-protecting rings, in carloads, from points in the Southwest to St. Louis and East St. Louis. Charges on some of the shipments had been collected on the scrap-iron basis and on others at rates not shown of record. Complainants' principal contention there was that the commodity shipped was scrap iron and that the application of any rates higher than the scrap-iron rates was illegal. Division 3 found that the scrap-iron rates collected were inapplicable; that the applicable rates were the class or commodity rates on pipe fittings, plus 10 per cent thereof when loaded loose at random, and that the applicable rates had not been shown to be unreasonable. Thereafter the carriers filed suits in court to enforce collection of the outstanding undercharges. Those shipments are included in the claims herein.

While complainants admit for the purpose of this proceeding that the rates on scrap iron are not applicable, they contend that reasonable rates on thread protectors should bear some definite relation to the scrap iron rates. The rates on scrap iron within the Southwest are based on alternative distance scales of 15 per cent of first class, minimum 50,000 pounds, and 12.5 per cent of first class, minimum 75,000 pounds.

Complainants propose rates on used thread protectors based upon alternative minimum weights of 40,000, 60,000, and 80,000 pounds. The proposed rates on the 80,000-pound minimum are the same as those on scrap iron for 50,000 pounds. On the 60,000-pound minimum the proposed rates average about 6 cents, and on the 40,000-pound minimum about 12 cents, higher than those proposed for 80,000 pounds. The rates proposed in connection with minima of 40,000 and 60,000 pounds bear no definite relation to the scrap iron rates, but, generally speaking, from points in Louisiana to Cairo they are about 9 cents higher than the rates on scrap iron on the 50,000 and 75,000-pound basis, respectively. As an example, the rates on scrap iron from Rodessa, La., to Cairo are 29 cents, minimum 50,000 pounds, and 24 cents, minimum 75,000 pounds. The proposed rates on used thread protectors are 29 cents, minimum 80,000 pounds, 33 cents, 60,000 pounds, and 38 cents, 40,000 pounds. The present rate is 59 cents.

From Odessa, Tex., to Cairo, 1,215 miles over the route of movement, the present rate is 86 cents, which yields on the minimum of 46,000 pounds earnings of 32.5 cents per car-mile. The scrap-iron rates from and to the same points are 43 cents, minimum 50,000 pounds, and 36 cents, minimum 75,000 pounds. Based on the same distance those rates and minima yield car-mile earnings of 17.7 and 22



cents, respectively. The average value of heavy melting steel at Chicago, Ill., in 1939 was \$14.90 per ton.

Complainants also compare the value of and the rates and earnings on many other commodities shipped for similar distances in the same general territory. These commodities include, among others, various kinds of seed and clay, clay products, returned empty containers for beverages, lignon liquor, pumicite drain tile, cottonseed hulls, petroleum, and cinders. In most instances the value of thread protectors is lower than the value of the compared commodities, while the rates and car-mile earnings are higher. However, the earnings on thread protectors are based on the average weight but those on the compared commodities are based on minima.

Complainants argue that considering the nature of the commodity, upon which there are no claims for loss or damage, and the type of equipment used, any rates higher than those proposed are patently unreasonable. They rely largely upon *Wrought Washer Mfg. Co. v. Pere Marquette Ry. Co.*, 159 I. C. C. 75, wherein division 3 found the rates on mill warmers, crop ends of iron and steel sheets, plates, skelp, strip and band iron and steel, and old and imperfect plates of dismantled boilers and floor plates, which could not be damaged by breakage or exposure to weather, loaded loose at random in open-top cars, from and to points in official territory unreasonable to the extent that they exceeded the contemporaneous rates on billets from and to the same points. That proceeding, which dealt with waste or scrap material, is not controlling in this proceeding which deals with a used article.

Defendants' testimony was directed mainly to the reasonableness of the applicable rates, that is, the rates on pipe and pipe fittings which include new, reconditioned, or old thread protecting rings having value only for recondi-



tioning. They point to the fact that the Commission in *Prairie Pipe Line Co. v. Arkansas W. Ry. Co.*, 146 I. C. C. 149, found among other things that the rate on new and secondhand iron or steel pipe between points in the Southwest were unreasonable to the extent that they exceeded 32.5 per cent of first class. The Commission also prescribed that basis on pipe and pipe fittings within western trunk-line territory and from points in official territory to points in western trunk-line territory and on pipe and related articles to, from and within the Southwest.

With respect to the packing requirements, such rules and regulations as are provided in the governing classifications apply in connection with class and commodity rates, except where the commodity tariffs provide their own packing rules. It is defendants' position that as long as the packing requirements and penalty provisions with respect to thread protectors remain in the tariffs, it is their legal duty to enforce them. On exceptions they state that if we believe that the packing requirements and penalty provisions are unreasonable, we should so find and apply that finding to new protectors as well as the old ones. The propriety of packing provisions for new thread protectors is not in issue and the record affords no basis for a determination of that question. However, in view of the manner of transporting used protectors and the fact that they are not susceptible to damage, we are of the opinion that it is unreasonable to require that they be packed for shipment.

The evidence is clear that used thread protecting rings have a relatively low value, as compared with new protecting rings, until after they are reconditioned. In fact, a large percentage of used rings are ultimately sold as scrap. None of them can be used for their original purpose until after the reconditioning process. They are, how-

ever, susceptible of definite identification and a separate description in the tariffs. It seems equally clear, therefore, that they cannot be described properly as scrap. We are here concerned with the problem of determining a just and reasonable basis of rates on used thread protecting rings, having value only for reconditioning, that will afford an equitable distribution of transportation costs. Such a basis properly should be lower than that maintained on the new article. The present record indicates that 25 per cent of first class would be reasonable maximum basis for application on this traffic.

We find that the applicable rates on used thread protecting rings, having value only for reconditioning, from and to the points covered by the complaint, as amended, were unreasonable to the extent that they exceeded rates made 25 per cent of the corresponding contemporaneous first-class rates, and that they are and for the future will be unreasonable to the extent that they exceed or may exceed rates made 25 per cent of the corresponding present first-class rates, minimum 60,000 pounds.

We further find that complainants received shipments as described and paid and bore the charges thereon; that they have been damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates found reasonable for the past; and that they are entitled to reparation, with interest. Complainant should comply with rule V of the Rules of Practice. Defendants will be authorized to waive collection of outstanding undercharges to the basis of rates found reasonable herein.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 18th day of February, A. D. 1941.

No. 28215

Valley Steel Products Company, Mid-Valley Steel Company  
and Lester A. Crancer and George B. Fleischman

v.

Abilene & Southern Railway Company; Alton and Southern Railroad; The Alton Railroad Company; The Arkansas Western Railway Company; The Atchison, Topeka and Santa Fe Railway Company; The Beaumont, Sour Lake & Western Railway Company, (Guy A. Thompson, Trustee); Chicago, Burlington & Quincy Railroad Company; Chicago and North Western Railway Company, (Charles P. Megan, Trustee); The Chicago, Rock Island and Gulf Railway Company, (Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees); The Chicago, Rock Island and Pacific Railway Company (Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees); Cisco & Northeastern Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, Lessee); The Colorado and Southern Railway Company; Eastland, Wichita Falls & Gulf Railroad Company; Fort Worth and Denver City Railway Company; Great Northern Railway Company; Gulf, Colorado and Santa Fe Railway Company; Illinois Central Railroad Company; International-Great Northern Railroad Company (Guy A. Thompson, Trustee); The Kansas City Southern Railway Company; Litchfield and Madison Railway Company; Louisiana & Arkansas Railway Company; Louisiana, Arkansas & Texas Railway Company; Manufacturers' Junction Railway Company; Manufacturers Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company (G. W. Webster and Joseph Chapman, Trustees); Missouri and Arkansas Railway Company;

Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas; Missouri Pacific Railroad Company (Guy A. Thompson, Trustee); Mobile and Ohio Railroad Company and C. E. Ervin and T. M. Stevens, Receivers; New Iberia & Northern Railroad Company (Guy A. Thompson, Trustee); New Orleans and Northeastern Railroad Company; New Orleans, Texas & Mexico Railway Company (Guy A. Thompson, Trustee); The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Northern Pacific Railway Company; Panhandle and Santa Fe Railway Company; Paris and Mt. Pleasant Railroad Co.; The St. Louis, Brownsville and Mexico Railway Company (Guy A. Thompson, Trustee); St. Louis, San Francisco and Texas Railway Company; St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, Trustees); St. Louis Southwestern Railway Company (Berryman Henwood, Trustee); St. Louis Southwestern Railway Company of Texas (Berryman Henwood, Trustee); Southern Pacific Company; Terminal Railroad Association of St. Louis; Texas and New Orleans Railroad Company; The Texas and Pacific Railway Company; The Texas Mexican Railway Company; Texas-New Mexico Railway Company; Union Pacific Railroad Company; Wabash Railway Company and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers; Wichita Falls & Southern Railroad Company; The Wichita Valley Railway Company; and The Yazoo and Mississippi Valley Railroad Company.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they



are hereby, notified and required to cease and desist, on or before May 29, 1941, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of used iron pipe-thread protecting rings, from and to the points set forth in the next succeeding paragraph, any rates in excess of those prescribed in said paragraph.

**It is further ordered,** That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before May 29, 1941, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation of used iron pipe-thread protecting rings, having value only for reconditioning, from points on defendants' lines in Louisiana, Arkansas, Texas, New Mexico, California, Montana, Wyoming, Michigan, and Canada, in so far as the transportation takes place within the United States, to St. Louis, Mo., and East St. Louis and Cairo, Ill., rates which shall not exceed rates made on basis of 25 per cent of the corresponding first-class rates, minimum 60,000 pounds.

**It is further ordered,** That said defendants, according as they participate in the transportation, be, and they are hereby, authorized to waive collection of outstanding undercharges on the shipments described in the aforesaid report herein.

**And it is further ordered,** That this order shall continue in force until the further order of the Commission.

By the Commission, division 3.

(Seal)

W. P. BARTEL,  
Secretary.



FILE COPY

Office - St. Louis, Mo.  
FEB 23 1942  
CHARLES B. ROSENBLUM

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

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No. 505

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LESTER A. CRANCER and GEORGE B. FLEISCHMAN,  
Co-Partners Doing Business Under the Firm Names  
of VALLEY STEEL PRODUCTS COMPANY and  
MID-VALLEY STEEL COMPANY, respectively,  
*Petitioners and Appellants Below,*

VS.

FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH  
B. FLEMING, Trustees of the Chicago, Rock  
Island and Pacific Railway Company, a Corpora-  
tion, *Respondents and Appellees Below.*

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**PETITIONERS' REPLY BRIEF**

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**No. 505**

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**LESTER A. CRANCER and GEORGE B. FLEISCHMAN,**  
Co-Partners Doing Business Under the Firm Names  
of **VALLEY STEEL PRODUCTS COMPANY** and  
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*Petitioners and Appellants Below,*

vs.

**FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH  
B. FLEMING,** Trustees of the Chicago, Rock  
Island and Pacific Railway Company, a Corpora-  
tion, *Respondents and Appellees Below.*

---

**PETITIONERS' REPLY BRIEF**

Petitioners deem it essential to reply to respondents' brief in concise and orderly fashion primarily for the reason that respondents' brief has opened for consideration all of the issues which were involved in the trial of the instant cause in the District Court as well as those issues which were raised by petitioners' application for writ of certiorari.

We welcome the opportunity to meet all the issues thus raised, squarely, and we believe thereby that we shall be enabled to convince this Court that the decision of the District Court should be reversed outright. We take this position confidently even in the face of the adjectival barrage which counsel has thrown against petitioners' application for writ of certiorari and brief in support thereof.

Petitioners' statement is termed by counsel "inaccurate", "incomplete", "obscure" and "rambling"; all of this without a bill of particulars from respondents as to the manner in which the statement is "inaccurate", "incomplete", "rambling" or "obscure", and despite the fact that this Honorable Court granted the writ of certiorari.

Petitioners resent this method of presentation, which smacks of propaganda rather than argument. We do not think that the propaganda will prove successful.

We proceed now with an analysis of respondents' brief, point by point.

# I.

The first point made by respondents is that the District Court's judgment in favor of respondents and against petitioners was supported by evidence there adduced. We emphatically deny this contention of respondents and we have consistently denied it in the District Court and in the United States Court of Appeals.

The respondents' petition in the District Court sought to recover additional freight charges on certain shipments of pipe thread protectors. Petitioners had previously paid to the railroad the so-called "scrap iron rate" on the shipments involved. The railroad alleged it was entitled to recover from petitioners the same rate on discarded thread protectors as was charged by the railroads for shipments of new thread protectors. There could be no question but

what it was the duty of the railroad to show, and the burden of proof was upon it to show, that it was entitled to these additional freight charges. In other words, the burden of proof was upon the railroad to show that the articles shipped came within some other definite classification than that of "scrap iron".

The definition of scrap iron or steel in the tariff is as follows:

"Pieces of iron or steel having value for remelting purposes." (R. 158-59.)

Both parties to the suit agreed that this "value" was a commercial value, (R. 47-164) and it thus became necessary for the railroad, in order to win the case, to show by relevant evidence that the articles in question had a greater commercial value in dollars and cents than "scrap iron" had.

If a careful review is made of the testimony of the respondents' witnesses in respect to the material in the cars, certain striking and uniform facts will be observed. The only witnesses for the respondents who saw the material shipped in the cars in question were inspectors who worked for the Western Weighing and Inspection Bureau. This was an agency of the railroads set up for the express purpose of checking into rates under which various commodities moved as freight. Of course, their aim would be most likely to fix such rate as would give the railroads more money if that were in any manner possible.

The thread protectors in the various cars were piled helter skelter in open coal cars, (R. 75) and these inspectors did nothing by way of inspection but walk over the tops of the cars, (R. 82, 83, 123, 142), and then changed the classification of the material, based upon such cursory inspection.

Uniformly, they had no expert knowledge whatsoever as to the thread protectors contained in the cars. They



did not know if the thread protectors were made of iron or steel. (R. 157-160) They did not know the difference between iron and steel.

Inspector McGrane, for example, said that he made the change from the scrap iron rate to the other rate, which appeared as "rings, thread protecting, iron, in packages" because he came to the conclusion that the articles in the car had some other value than for remelting purposes. (R. 70) and when asked as to whether or not he knew anything at all about the value of the articles, his answer was an unequivocal "No."

When petitioners sought to have this testimony of McGrane stricken from the record, the Court refused and permitted it to stand, (R. 70-71), and this was clearly erroneous. Witness McGrane also showed his utter lack of any knowledge about the applicable freight rates when he stated that even if the protectors were consigned to a mill for remelting purposes and had value only for remelting purposes, he still would apply the rate applicable to new protectors. (R. 77) He took the wholly unwarranted position that even if the threads were completely rusted off a thread protector, and even if it was pitted and had holes in it, he would classify the cars questioned as containing thread protectors which should take the rate applicable to new thread protectors. (R. 79)

Again, with a similar lack of any knowledge whatsoever about the thread protectors, their composition or nature, Inspector Timmons, over the objection of the petitioners, testified that from his observation, the thread protectors were usable in the condition in which they were found in the cars which he inspected. (R. 91.) Timmons likewise did not know the value of the thread protectors as expressed in terms of money (R. 106), and he did not even bother to look at the classification book, but changed the classification from scrap iron to thread protecting rings arbitrarily. (R. 107-108.)

Inspector Usher likewise made an arbitrary change in the rate to be applied to the shipments in the car which he inspected, but he made the significant admission that if a carload of protectors such as he saw were going to a mill for remelting, such car would get the scrap iron rate. This inspector stands convicted out of his own mouth, that he was seeking to gain for the railroad additional freight charges on a basis which the Interstate Commerce Act itself forbids, to-wit, the use basis.

Inspector Stohlman, again, made a casual inspection by walking on top of an open car that was loaded as much as five feet deep (R. 142) with thread protectors. He stated that the basis of his inspection was that since none of the thread protectors were broken or badly bent, he would not call them scrap (R. 141). He had no more expert or other knowledge about the thread protectors, or their nature or quality, or whether or not they were fit to be remanufactured, or what the remanufacturing process was, than any of the other so-called inspectors.

In connection with the question as to the commercial value of the articles shipped in the cars in controversy, there was only one witness who was asked the specific question of whether or not the material had a commercial value for remelting purposes. One of the petitioners, George Fleischman, was asked this question and was permitted by the court to answer it as follows, to-wit:

"Q. I will ask you to state whether or not the material shipped in these seven cars had any commercial value, other than for remelting purposes \* \* \* at the time it was shipped?"

"A. The material shipped in these cars had no commercial value other than for remelting purposes."  
(R. 215.)

At only one place in respondents' record was there any effort to introduce testimony by the respondent concern-

ing this vital issue, and it is petitioners' contention that this testimony was either of no probative value or wholly inadmissible. Respondent's witness, Perry, was the traffic manager for the Pittsburg Screw & Bolt Corporation, the manufacturer of the new thread protectors which are the subject of this controversy. (R. 161.)

Perry was asked the following question by respondents:

"Q. During that period between June and August, 1937, what was the prevailing market price of thread protectors sold for reconditioning purposes?" (R. 165.)

His answer was: "\$20.00 to \$50.00 a ton."

This testimony had no probative value in that there was not a scintilla of evidence in the record that there was any market price for thread protectors sold for reconditioning purposes. All of the testimony in the record was that the thread protectors were purchased from scrap iron yards or oil companies which had accumulated them as scrap (R. 215, 216, 217, 218), and they were not sold for any specific purpose such as for reconditioning.

It might well be that thread protectors bought or sold for the specific purpose of reconditioning them might have had a greater commercial value than scrap iron or steel, and thus the market price which Mr. Perry testified to, might well have been higher than the market price of thread protectors shipped in the seven cars. This is wholly conjectural, however, and suffice it to reiterate at this point that Perry gave no testimony concerning the market value of the thread protectors such as were contained in the seven cars in question.

Perry's testimony as to the price of scrap iron was likewise of no value in this proceeding. He was asked if he had had any experience in scrap iron. (R. 174.) He replied that he had had over a period of "several years."

He stated further that it had been his business to keep track of the prevailing market value of scrap iron at different periods, and that this had come under his duties as general traffic manager.

Then the precise question was asked him:

"Q. Have you refreshed your recollection, and can you tell the Court what was the prevailing market price of scrap iron for remelting purposes in 1937?" (R. 174.)

Counsel for petitioners objected to the question as not being the proper way to prove the market price, and further that the witness was not qualified to testify. On the objection being overruled, the witness testified: "\$12.00 to \$17.00 a gross ton." Counsel for petitioners then moved that the answer be stricken out for the reason that it was not limited as to time and locality.

It is obvious from the testimony we have quoted that it should never have been permitted in evidence. It is well known, and not a matter of any dispute, that the price of scrap iron varies from day to day, week to week, and month to month, and varies as well in various localities depending on the transportation cost and other circumstances.

The shipments in question, as set forth in respondents' petition (R. 4) moved during the months, June to August, 1937. Thus, Perry's testimony was valueless because it was not directed to this period, June to August, 1937, but to the whole year, and it was not directed to the value of scrap iron in the locality where the material was shipped or the locality where it was received.

In the case of U. S. v. Baxter, et al., 46 Fed. 350, the witness was asked as to his best recollections as to the value of certain logs, and it was pointed out in the opinion that the witness's evidence was not directed to the



particular place where the value was to be fixed, and the Court stated that the value might be one thing in one city and another value in another city, and criticized the question and the answer given to it because neither confined the value "at any particular place", and the Judge held that it was an error to permit the witness to answer such question. Appeal to the Supreme Court of the United States was dismissed in this matter without opinion of the Court, at Volume 12 U. S. 989.

Similarly, in *Morrow v. Wabash Railway*, 276 S. W. 1030, (Kansas Court of Appeals), testimony of the witness who had no experience in selling live stock in a given market, and whose opinion was not based on a reading of market reports published in trade journals, was criticized as incompetent, and it is obvious from the decision in this case, that the market value must be fixed at a given locality before testimony concerning it is admissible.

In *Pabst Brewing Co. v. Horst Co.*, 229 Fed. 913, 1. c., 919, the Court considered testimony as to market value and ruled that in order to be admissible, the market price must relate to the specific period in question or reasonable time before and after, and to the exact and particular locality of the delivery of the goods in question.

The rule is succinctly stated in 22 Corpus Juris, pages 189 and 190 in its treatise on the subject of Evidence as follows:

"If property has a market value at the place involved in the inquiry, the evidence is properly directed to establishing it at that place. . . . When the issue of value of personal property is involved in an action, it is usually with respect to the value at some particular time, and hence evidence of value is relevant only when directed to value at the time in question or at a time so near thereto that it may reasonably be expected to throw some light on the value at such time."



Witness Perry did not tell the District Court in what locality the market price for scrap iron, in 1937, amounted to \$12.00 to \$17.00 per ton; nor did he tell the Court what the market price was at the relevant time from June to August, 1937, and therefore his testimony should not have been admitted.

There was no testimony concerning the market price of scrap iron anywhere in the record other than Perry's. It, therefore, ought to be conceded that the Court had no proper admissible evidence upon which a judgment might be based to the effect that the commercial value of scrap iron in the localities from which the cars were shipped or delivered, was less than the commercial value of discarded thread protectors.

Reviewing the case as a whole, the conclusion is inescapable that respondents did not show that the material shipped had any commercial value other than for remelting purposes, and therefore, respondents should not have prevailed in the District Court and this cause ought to be reversed outright.

With reference to the manifest error of the District Court in permitting the testimony to be adduced with reference to the use to which the material shipped was put, and the error in basing its decision in favor of respondents upon the use to which the material was put,—petitioners feel that they have covered this issue fully in their original brief. Respondents' attempts in this connection to assert that the cases of *Interstate Commerce Commission v. Delaware, Lackawanna & Western R. R.*, 220 U. S. 235 and *Interstate Commerce Commission v. Baltimore & Ohio R. R.*, 225 U. S. 326, are not applicable,—are wholly and completely illogical.

The conceded rule is that a railroad may not fix one rate for an article to one shipper and a different rate to

another shipper based on the use to which the individual shipper may put the article. How fantastic is it then to argue that while this is the rule, yet evidence is admissible on the matter of use, to show the character of the article; for, when a court permits introduction of evidence to show use for this purpose and when a court then bases its decision that a given article takes a higher freight rate because used in a different manner by a particular shipper, then the whole theory underlying the anti-discriminatory Section 2 of the Interstate Commerce Act is rendered a hollow joke.

In the case at bar, we find this situation: The decision of the District Court permits the article in question to be shipped to a scrap mill for remelting purposes at the scrap iron rate (R. 247-8) while the identical articles when shipped to petitioners for re-manufacturing would be charged the rate applicable to new pipe fittings which is three to four times higher than the scrap rate. Is this not a glaring example of discrimination which our Congress has definitely forbidden in the Interstate Commerce Act, Section 2? A reversal of this case will prevent such discrimination.

## II.

The admission in evidence of the decision of the Interstate Commerce Commission in Crancer, et al. v. Abilene & Southern Ry. Co., et al., 223 I. C. C. 375 (R. 190-195) was clearly a reversible error and cannot be said to be harmless error. The decision was admitted on the theory that it was "evidence of what the correct tariff rate is" (R. 195) and it is obvious that the decision in that case, which did not relate in any way to the shipments in issue in the case at bar, was no evidence whatsoever of what the correct tariff rate was on the shipments in the case at bar. Especially is this true since the Court's finding and judgment were supported by no other competent evidence.

## III.

Respondents in the third portion of their brief asserted that the District Court had the right to proceed with the trial of the case even though petitioners' complaint was pending before the Interstate Commerce Commission with respect to the reasonableness of the tariff rate sought to be collected in the suit at bar.

Respondents seek to confuse the issue by asserting that the complaint now pending before the Interstate Commerce Commission is the same as the previous complaint filed, which resulted in the decision of the Commission in the case of Crancer v. Abilene, 223 I. C. C. 375; but this is not a fact. The three-judge court decision of the District Court (Cramer, et al. vs. U. S., 23 Fed. Sup. 690), which dismissed petitioners' bill to enjoin the Crancer decision of the I. C. C., is then mentioned by respondents. Then, respondents state that this Honorable Court affirmed the decision of the three-judge court in Crancer v. U. S., 305 U. S. 567. However, respondents failed to state that the three-judge District Court in its opinion in 23 Fed. Sup. 690, refused to consider the order and decision of the Commission upon the first complaint (223 I. C. C. 375), for the reason that the order was held to be a negative order and therefore not reviewable. The three-judge District Court never passed upon the merits of the order of the I. C. C. upon the complaint (223 I. C. C. 375). And respondents also failed to point out that this Honorable Court in 305 U. S. 567 sustained the decision of the statutory three-judge court for the same reason that the order sought to be reviewed was a negative order and therefore not reviewable, and upon the authority of a line of decisions commencing with Hooker v. U. S., 225 U. S. 302, and ending with U. S. v. Griffin, 302 U. S. 226.

Respondents have also failed to state that the negative order theory is a relic of the past in light of the decisions

in the cases of Rochester Telephone Corp. v. U. S., 307 U. S., 425, 59 S. Ct. 754, and Mitchell v. U. S., 313 U. S. 80, 61 S. Ct. 873, in which it has been held (specifically in the latter case) that an order of the I. C. C. though negative in form is subject to review by the Courts of the U. S. in the statutory manner prescribed.

Thus, we have the situation of this first complaint filed before the Commission upon which an order of the Commission was made, but as to which petitioners never have had their "day in court" to determine whether or not the order of the Commission was proper.

Nevertheless, there is now pending before the Commission a complaint which is substantially different in form and substance from that of the first complaint upon which no review was ever had in the courts of the United States. That there is and was a substantial difference between the second complaint now pending and the first complaint, is clearly attested by the fact that the Commission upon hearing of the second complaint handed down a decision (243 I. C. C. 509) in which the rates in question in the case at bar were definitely and unequivocally found to be unreasonable, not only for the past but also for the future. All the railroads involved were ordered to post new rates conforming to the order of the Commission. Subsequently, the Commission re-opened the matter for further hearing and such further hearing has been held, but the decision in 243 I. C. C. 509, which petitioners filed with their writ of certiorari as "Appendix A" is the last expression of the Commission and we believe that it is proper to say that until the Commission issues a new order (if any is to be issued) the rates involved in the case at bar have been decided by the Commission itself to be unreasonable.

The foregoing statement of the status of the complaint now pending before the Commission should give fresh confirmation, if any is required, to the rule so aptly ex-

pressed in the cases cited by Petitioners in their original brief to the effect that where a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission and this is true whether the function being exercised is either administrative or judicial.

The pending complaint before the Commission was filed prior to the suit in the case at bar and respondents were parties to that complaint. They had no right to proceed with the trial of their cause in the District Court when the very rates which they were seeking to collect were charged with being unreasonable. It is clearly the duty of the I. C. C. to determine this fact first. It is not the duty of the railroad to collect a tariff rate which is unreasonable. The tariff rate which respondents sought to collect in the instant suit has been held to be unreasonable by Div. 3 of the Interstate Commerce Commission (243 I. C. C. 509). That a further hearing has been granted by the Commission certainly does not give any assurance to the respondents that the Commission will not reaffirm its ruling that the rates were unreasonable, and therefore there should not have been the unseemly haste on the part of the respondents to prosecute its suit, pending the outcome of the decision of the complaint before the Commission.

There are other cases pending in the Eastern District of Missouri (at St. Louis, Mo.) of an exactly similar nature as that of respondents' and another district judge in St. Louis (R. 33) recognized that the trial of the causes before him should not be had pending the outcome of this complaint before the Commission. In fact, in the instant case at bar, District Judge Moore did postpone the trial of this case upon petitioner's request and upon the very grounds here urged for the postponement of the trial, but then the court changed its mind and this was not within



the sound discretion of the court in continuing or failing to continue an ordinary cause; for, it was the bounden duty of the court not to proceed with a case while the Commission had the matter of the reasonableness of the rates before it.

The decision cited by respondents in the Second Circuit, Penn. Ry. Co. v. Fox & London, 93 F. (2d) 669, is no authority for respondents' position, for in this last named case, there is no showing that the matter of the proper freight rate had ever been brought by complaint before the Commission prior to the bringing of the suit by the railroad carrier, or at any other time.

Respondents have sought to distinguish the authorities which we cited in our original brief, but in our opinion they have failed to do so, since the rules contained in the cases cited by us originally are fully and completely applicable to the situation in the case at bar.

We cannot understand why it was necessary for this respondent to prosecute their action with almost religious fervor when seven or eight railroads in identical causes have been willing to await the outcome of the proceedings before the Commission. The only situation which seems to furnish a clue to this puzzle is in the fact that one of the prominent witnesses, for railroad respondent was a man by the name of Perry. Perry was the traffic manager for the Pittsburg Screw and Bolt Co. (R. 161) which manufactured thread protectors involved here as new items.

The Pittsburg company was definitely interested in preventing competition by petitioners who reconditioned and re-manufactured the scrap thread protectors. Witness Perry appeared voluntarily, without subpoena and out of a sick bed (R. 184) and testified for the railroad that the rate on scrap thread protectors should be the same as on

new thread protectors in his opinion and in the opinion of his company.

Perry and his company have appeared in the proceedings before the I. C. C. as intervenors, and up to recently have consistently insisted that the rate on new thread protectors should likewise be applied on scrap thread protectors. We think it is the proper inference to draw from the record that the instant cause of action has been sought to be rushed at the insistence and with the support of the Pittsburg company in its effort to do away with the competition furnished by petitioners by means of their remanufacturing processes.

We adhere to the belief that our District Court should not thus proceed with an action, when its judgment is likely to result in giving to a railroad a verdict based upon a rate which has been or will be held by the I. C. C. to be an unreasonable rate, in a pending proceeding.

We respectfully pray this Court to reverse the judgment outright because it violates the letter and spirit of the I. C. C. Act and because of the lack of evidence to sustain a judgment on behalf of respondents; or in the alternative that it send this cause back with instructions to the District Court to await the outcome of the proceedings before the Commission.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

No. 505.

OCTOBER TERM, 1941.

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LESTER A. CRANCER and GEORGE B. FLEISCH-  
MAN, Co-Partners, Doing Business Under the Firm  
Names of Valley Steel Products Company and Mid-  
Valley Steel Company, Respectively, *Petitioners and*  
*Appellants Below.*

VS.

FRANK O. LOWDEN, JAMES E. GORMAN and  
JOSEPH B. FLEMING, Trustees of the Chicago,  
Rock Island and Pacific Railway Company, a Corpora-  
tion, *Respondents and Appellees Below.*

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**RESPONDENTS' BRIEF IN OPPOSITION TO  
PETITION FOR CERTIORARI.**

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1941.

LESTER A. CRANCER and GEORGE B. FLEISCH-  
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Names of Valley Steel Products Company and Mid-  
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VS.

FRANK O. LOWDEN, JAMES E. GORMAN and  
JOSEPH B. FLEMING, Trustees of the Chicago,  
Rock Island and Pacific Railway Company, a Corpora-  
tion, *Respondents and, Appellees Below.*

**RESPONDENTS' BRIEF IN OPPOSITION TO  
PETITION FOR CERTIORARI.**

**THE OPINIONS OF THE COURTS BELOW.**

No opinion was filed by the District Court and the  
opinion of the Circuit Court of Appeals has not yet been  
officially reported.

**JURISDICTION.**

It is the position of respondents that the petition for  
certiorari does not present either in form or substance  
any question for review by this Court.

## STATEMENT OF THE CASE.

Petitioners' statement of the matter involved is inaccurate, incomplete and obscure.

The case is well stated by the Circuit Court of Appeals in its opinion (R. 341-346), from which we quote, with footnotes citing supporting pages of the record, as follows:

"This appeal is from a judgment in favor of the Trustees of the Chicago, Rock Island and Pacific Railroad Company, and against appellants, Lester A. Crancer and George B. Fleischman, co-partners doing business under the firm names of Valley Steel Products Company and the Mid-Valley Steel Company respectively, for shipping charges on steel pipe thread protectors. The case was tried without a jury. At the conclusion of the trial the Court made findings of fact and stated conclusions of law, in writing, and entered judgment in favor of appellees for the sum of \$2,263.47.<sup>1</sup>

"The present controversy involves the proper classification of the commodity under the existing tariffs.<sup>2</sup> The shipments, seven car loads, moved from points in Montana, Texas, California and Louisiana where appellants had billed the cars to themselves at St. Louis, Missouri.<sup>3</sup> The billings classified the contents of the cars as 'scrap iron' and the tariff charge applicable to that classification was paid. When the shipments arrived at St. Louis, appellees' rate clerk requested the Western Weighing and Inspection Bureau to inspect the contents of the cars. That inspection resulted in a rating of the shipments as pipe

1. (R. 3-10, 29, 32, 292-5, 302-3.)

2. (R. 4-16, 12-13.)

3. (R. 25-29.)

fittings.<sup>4</sup> The classification 'pipe fittings' included thread or pipe protector rings.<sup>5</sup> The tariff rate on scrap iron being less than the rate on pipe thread protector rings, demand was made upon appellants for the difference on the tariff. Refusal to comply with that demand resulted in this action.<sup>6</sup>

. . . . .

"The commodity in question, referred to in various terms such as 'pipe protectors,' 'pipe fittings,' 'pipe thread protectors,' 'protecting rings,'<sup>7</sup> were found by the trial court to be used 'iron pipe thread protecting rings.'<sup>8</sup> These articles are used to protect the threads and the ends of pipe from injury in handling or shipment.<sup>9</sup> Appellants are engaged in the business of purchasing the used articles, repairing and re-selling them. All of the shipments were of the used articles which were being sent to appellants' plant at St. Louis.<sup>10</sup> The repairing or re-conditioning process consisted in a general way in a patented process of straightening those which were not too badly damaged and refinishing the threads. The remainder were useless except for re-melting.<sup>11</sup> One of the appellants, testifying on direct examination, indicated that approximately ninety per cent of the articles contained in these shipments could possibly be repaired for use.<sup>12</sup> On cross examination he stated that approximately sixty per cent were repaired and the remaining forty per cent discarded for re-melting.<sup>13</sup> There was other evidence to the same effect.<sup>14</sup> The articles were shipped in open coal cars. The good and bad were co-mingled, were loose in the cars, and none were bound or tied to-

4. (R. 36-40; 133.)

5. (R. 109, 110, 112-122, 128-137, 190-196.)

6. (R. 25-29.)

7. (R. 42, 55, 90, 93, 123.)

8. (R. 293.)

9. (R. 42, 90, 92, 123.)

10. (R. 215-223, 220-238, 245.)

11. (R. 199-209.)

12. (R. 210-211.)

13. (R. 237.)

14. (R. 161-176.)

gether in any way.<sup>15</sup> The tariff contained a provision that when a number of different articles were co-mingled in a car all should take the rating of the highest classed or rated article in the car.<sup>16</sup> The reclassification was based upon the following item of the tariff: 'Pipe Fittings:—rings, thread protecting, iron in packages.'<sup>17</sup> Appellants' proof tended to show that the thread protecting rings were made of steel. It is their contention that therefore the commodity did not fall within the classification of 'iron' pipe thread protecting rings. Numerous metal objects were elsewhere classified under the heading 'Iron or Steel,' That heading does not appear above the item 'Pipe Fittings' quoted above. There is, however, a tariff provision as follows: 'Unless the contrary appears, the word "iron" wherever used in this classification includes, also, steel; and vice-versa.'<sup>18</sup> Another provision of the tariff provided for a ten per cent penalty for shipment of articles such as these loose or uncrated and not in packages.<sup>19</sup> There was no difference in tariff rates on new and on used pipe protecting rings.<sup>20</sup>

"The classification relating to scrap iron provided that it should apply only to iron or steel having value for remelting purposes only.<sup>21</sup> . . .

"The trial court found that the shipments were not of scrap iron or steel possessing value only for re-melting purposes, but were of used 'iron pipe thread protecting rings.'<sup>22</sup> . . .

"The argument is advanced that the finding should be set aside because there was no proof that

15. (R. 47, 52-3, 72, 82-3, 88, 90-93, 96, 103, 123, 127, 138-142.)

16. (R. 130-131, 190-196.)

17. (R. 109, 110, 112-122, 128-137, 190-196.)

18. (R. 153, 286.)

19. (R. 113-119, 121, 128-9, 190-196.)

20. (R. 194, 290.)

21. (R. 132-3, 157-9, 190-196, 285-292.)

22. (P. 293, 294.)



the articles had a market or commercial value for any purpose other than for remelting. Appellants' evidence showed that these seven and a great many more carloads of pipe thread protectors were purchased by them for reconditioning purposes.<sup>23</sup> There was substantial evidence that a fairly well established price existed for used pipe thread protectors in the territory where they were available.<sup>24</sup> • • •

• • • • •  
 "• • • In addition to the evidence showing the purpose for which appellants purchased the articles and the use to which they were put, there is an abundance of testimony to the effect that the articles were used pipe thread protectors, having an established market value as such, as distinguished from mere scrap iron.<sup>25</sup> • • •

• • • • •  
 "The evidence is uncontroverted that the major portion of each car load of the shipments involved were used pipe thread protecting rings and were shipped loose and co-mingled in the cars.<sup>26</sup> As heretofore demonstrated the proof justified the classification of the major portion of each shipment as pipe fittings consistent of used iron pipe thread protecting rings and not as scrap iron having a value for remelting purposes only.

"The Tariff heretofore quoted in the margin provided that when articles were shipped in a mixed carload the classification applicable to the highest classed or rated article in the car should apply.<sup>27</sup>  
 • • • • •

As stated by petitioners, respondents, plaintiffs in the District Court, introduced in evidence at the trial, over

23. (R. 199-209, 220-238, 245, 257-268.)

24. (R. 161-176, 220-238, 245.)

25. (R. 161-176, 199-209, 220-238, 245.)

26. (R. 47, 52-3, 72, 82-3, 88, 90-93, 96, 103, 123, 127, 138-9, 142, 210-211, 237.)

27. (R. 130-131.)

objection of petitioners, defendants, the opinion and report of the Interstate Commerce Commission, in the case of *Crancer, et al., v. Abilene & Southern Railway Company, et al.*, 223 I.C.C. 375 (R. 190-195). That case involved a complaint before the Commission, filed by the defendants against a number of railroads, in which the defendants asserted that shipments of iron or steel thread protecting rings similar to the shipments involved in the case at bar should be classified under the freight tariffs as scrap iron and that class or commodity rates on pipe fittings were inapplicable and unreasonable. The Commission, on August 6, 1937, held scrap iron rates inapplicable and class or commodity on pipe fittings applicable and reasonable, and dismissed the complaint (R. 190-195, 223 I.C.C. 375).

It may also be stated that on March 16, 1939, the same day upon which the complaint in the case at bar was filed (R. 3), the defendants filed with the Interstate Commerce Commission another complaint similar to the one dismissed by the Commission on August 6, 1937, again complaining that rates on used iron or steel pipe fitting protecting rings in excess of scrap iron rates were unreasonable and inapplicable (R. 14, 17-24); that after some delay the said last named complaint was set for hearing before an Examiner of the Commission on February 29, 1940 (R. 33-4); that by motion for a continuance filed and denied in the District Court before trial (R. 14, 24-5), by application to the Circuit Court of Appeals for prohibition filed and denied by the Court before trial (R. 25, 33), and by objection made and overruled at the beginning of the trial of the case at bar on January 31, 1940, to February 7, 1940 (R. 32-34), defendants sought the postponement or stay of the trial of the case until the determination by the Interstate Commerce Commission of the second, last mentioned complaint of defendants.

At page 6 of their petition petitioners refer to a decision of the Interstate Commerce Commission on February 18, 1941, upon the said second complaint of the petitioners before the Commission, and attach as an appendix to their petition and brief, pages 23 to 34, the decision of the Commission so referred to, in which it was again held that scrap iron rates were not applicable to shipments such as those in suit but that class or commodity rates were in part unreasonable.

The reference to this decision of the Interstate Commerce Commission of February 18, 1941, following the completion of the trial in the case at bar and the judgment entered on February 7, 1940 (R. 302-3), is of course a reference to matter outside of the record. The reference to this decision of the Interstate Commerce Commission as an effective and current ruling of the Commission is also lacking in candor. As appears from a certified copy of the subsequent proceedings of the Commission, which we have filed with the clerk of this Court, the decision of February 18, 1941, has been suspended and the case set down for further hearing before an Examiner of the Commission on September 12, 1941.

## ARGUMENT.

The petition for certiorari (page 7) refers the Court to the rambling and obscure statement of the "Matter Involved" for the "Questions Presented." As "Reasons Relied On for the Allowance of the Writ," the petition merely avers that the opinion of the Circuit Court of Appeals decided a Federal question in a way in conflict with applicable decisions of this Court and cites a number of decisions, without indicating the questions ruled or the respect in which it is claimed that the opinion of the Circuit Court of Appeals is in conflict with the decisions cited, other than to refer the Court to the brief of petitioners in support of the petition. The brief (pages 9 to 21) sets out and argues three specifications of error. Paragraph 2 of Rule 38 of this Court permits a brief in support of a petition for certiorari, but the petition must be complete in itself and the requirements for the petition prescribed by the rule cannot be supplied by the supporting brief. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 177-8; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 357.

If the Court should conclude, however, that the petition is sufficient to raise the points mentioned and argued in petitioners' brief, the points are without merit and present no question for review by this Court. We discuss them in the order in which they are set out in petitioners' brief.

### I.

The Circuit Court of Appeals did not err in sustaining the judgment for additional freight charges. The Court correctly held that the judgment was

properly and abundantly supported by the trial court's findings of fact that the shipments were not scrap iron or steel having value for remelting purposes only, but were used iron or steel pipe thread protecting rings. By defendants' own evidence the shipments in question and a great many similar shipments were purchased by defendants for reconditioning purposes without remelting and from sixty to ninety per cent of each of the shipments in question were actually reconditioned for resale as used protecting rings by defendants, without remelting. By the evidence of both parties a substantial and major portion of each of the shipments was used pipe thread protective rings, having an established market value as such and not of value for remelting purposes only. The Circuit Court of Appeals ruled in conformity with the applicable decisions of this Court and not in conflict with any of its decisions.

Petitioners argue that the District Court "must have based its judgment upon the theory" that the shipments were not scrap "because they were not used as scrap for remelting purposes only," because the trial court stated orally at the trial that he did not think that the shipments were "scrap iron" and observed that "the course of dealing, over a long period of time, shows that, as a matter of fact, it never was used in that way" (R. 292).

The trial court expressly found (R. 293-4) that the tariffs applicable to all the shipments provided rates for shipments of pipe fittings described as iron or steel thread protecting rings;<sup>1</sup> that the tariffs provided that when a number of different articles were commingled in a car all should take the rating of the highest classed or rated article in the car;<sup>2</sup> that each of the earload shipments involved contained iron or steel thread protecting rings so described in the tariffs;<sup>3</sup> that the tariffs applicable to

1. (R. 109, 110, 112-122, 128-137, 190-196.)

2. (R. 130-131, 190-196.)

3. (R. 47, 52-3, 72, 82-3, 88, 90-93, 96, 103, 123, 127, 132-9, 142.)



shipments between the points in question provided that ratings on scrap iron or steel applied only to iron or steel having value for remelting purposes only;<sup>4</sup> that the iron or steel thread protecting rings in the seven shipments were not iron or steel having value for remelting purposes only.<sup>5</sup>

These findings of fact are abundantly supported by the evidence which appears on the pages of the record cited in the above indicated footnotes. Indeed, there was no evidence to the contrary and petitioners do not contend for any.

As pointed out by the Circuit Court of Appeals (R. 344-5), the findings that the shipments were used thread protecting rings and not scrap iron or steel of value for remelting purposes only, are supported not only by defendants' own evidence that the shipments in question and a great many similar shipments were purchased by defendants for reconditioning purposes without remelting and from sixty to ninety per cent of each of the shipments in question were actually reconditioned for resale as used protecting rings by defendants without remelting (R. 199-209, 220-238, 245, 257-268), but also by an abundance of evidence (by both parties) to the effect that the articles were used pipe thread protectives, having an established market value as such, as distinguished from mere scrap iron (R. 161-176, 199-209, 220-238, 245).

Petitioners could not complain of the findings of fact and judgment even if the testimony as to the purpose for which petitioners were buying the shipments in question and other shipments, and the use to which they in fact put these shipments and other similar shipments, had been incompetent and inadmissible, since, as above pointed

4. (R. 132-3, 157-9, 190-196, 285-292.)

5. (R. 47, 52-3, 82-3, 88, 90-93, 103, 123, 127, 138-9, 161-176, 199-209, 220-238, 245.)

out, the findings and judgment were amply supported by other evidence of both parties, that the shipments in question contained pipe thread protecting rings having an established market value as such, as distinguished from mere scrap iron (R. 161-176, 199-209, 220-238, 245). Rule 61, Federal Rules of Civil Procedure; *Martin v. Ihmsen*, 21 Howard 394, 395; *Mammoth Mining Co. v. Salt Lake Foundry & Machine Co.*, 151 U. S. 447, 451; *Anderson v. United States*, 8 Cir., 65 F. (2d) 870, 872; *Wall v. United States*, 10 Cir., 97 F. (2d) 672, 673-4; *Jackson Furniture Co. v. McLaughlin*, 9 Cir., 85 F. (2d) 606, 609. Supported as they are by substantial and abundant competent evidence the concurrent findings of fact of the District Court and the Circuit Court of Appeals are conclusive. *Virginian Railway Co. v. Federation*, 300 U. S. 515, 542, and cases cited; *United States v. O'Donnell*, 303 U. S. 301, 508, and cases cited; Rule 52(a) Federal Rules of Civil Procedure.

There is, however, no merit to the contention of petitioners that the evidence as to the use to which the shipments in question and other shipments were put was not competent and material, and proper basis for a finding that the shipments in question were not scrap iron, having value for remelting purposes only.

In support of their argument petitioners cite two decisions by this Court, *Interstate Commerce Commission v. Delaware, Lackawanna & Western Railroad*, 220 U. S. 235, and *Interstate Commerce Commission v. B. & O. Railroad*, 225 U. S. 326. In the Lackawanna case it was held that the manner in which shipments of definitely identified articles were owned and assembled for shipment in one car could not change the shipment from a carload shipment as designated in the tariffs. In the B. & O. case it was held that the mere fact that coal which was the subject of shipment belonged to a railroad could

not change or destroy the classification of the coal under the tariffs; that the tariffs provided rates for the shipment of coal regardless of whether owned by a dealer or a railroad.

Neither of these cases has any application or in anywise supports petitioners' argument. The character and classification of the articles in shipment, under the tariffs, was a matter in dispute in the case at bar. The evidence as to the use for which the articles were purchased and to which they were put, was material and competent, not for the purpose of changing the character and classification of the articles, but for the purpose of determining their character and classification. The two decisions cited by petitioners do not hold, and this Court has never held, that the use to which articles are put is not some evidence of the character of the articles.

It is immaterial whether the two Interstate Commerce Commission cases cited on pages 12 and 13 of petitioners' brief support petitioners' contention. If they did there would still be involved no ruling of the Circuit Court of Appeals in conflict with applicable decisions of this Court. Nor do they establish any applicable rule or decision of the Interstate Commerce Commission. In the more recent decisions of the Commission upon the very question now raised by petitioners, upon the petitioners' own complaint, the Commission ruled the contention against petitioners:

"In *Wisconsin Waste & Wiper Co. v. Chicago & N. W. Ry. Co.*, 196 I.C.C. 459, 460, Division 5 said the use to which a commodity is put is not determinative of the applicable rate, but that the use may be considered in determining the nature of the commodity" (*Crancer, et al. v. Abilene & Southern Railway Co.*, 223 I.C.C. 375, R. 192).

At page 10 of their brief petitioners refer to testimony by one of the petitioners that he assembled at petitioners' plant and loaded and shipped to a mill for remelting purposes a car of thread protectors (R. 247-8). Petitioners themselves thus appear to argue that the use to which this particular car of thread protectors was put, to-wit, remelting, established the character of the shipment as scrap iron, having value for remelting purposes only. We concede that the use for which it was shipped and to which it was put was evidence that the particular shipment was scrap iron. The shipment so testified to by the petitioner was doubtless a shipment of rings which he could not recondition and which were, therefore, in fact of value for remelting purposes only, and, therefore, scrap iron. Petitioner did not testify that this car which he shipped as scrap iron was made up of any of the protectors involved in the shipments in question, nor would it have mattered if it had, since the shipments in suit contained substantial quantities of thread protectors which had value other than for remelting purposes and since the highest classified article controlled as to the rate on each car.

It is of course to be pointed out that the evidence as to the use for which the shipments in question and other shipments of like character were put was not merely evidence of a casual or accidental use. On the contrary, the evidence in question was to the effect that the shipments in question and many other similar shipments were purchased by defendants for the purpose of reconditioning, without remelting, and that from sixty to ninety per cent of the shipments in question and other shipments of like character to petitioners and others over a period of years were capable of being reconditioned and were in fact reconditioned without remelting, for sale as used thread protecting rings (R. 199-209, 220-238, 245, 257-268, 161-176).

The Circuit Court of Appeals disposed of the contention of petitioners in the following manner (R. 345-6):

"It is further contended that the finding that the pipe thread protectors did not possess a commercial or market value for remelting purposes only, was based solely upon testimony that appellants purchased the articles for reconditioning purposes and not for remelting purposes. Obviously, if the articles were scrap iron fit for remelting purposes only, their purchase by appellants for another purpose would not change the character of the articles. Nor should one rate be applied to the shipment of an article to be used for one purpose and another rate be applied to the shipment of the same article when it is to be used for another purpose. *Interstate Commerce Commission v. B. & O. Ry. Co.*, 225 U. S. 326. But evidence of the use for which the articles were purchased and the use to which they were actually put was properly considered in determining what they actually were. In addition to the evidence showing the purpose for which appellants purchased the articles and the use to which they were put, there is an abundance of testimony to the effect that the articles were used pipe thread protectors, having an established market value as such, as distinguished from mere scrap iron. If, as in *A. T. & S. F. R. Co. et al. v. U. S. ex rel. Sonken-Galamba Co.*, 98 F. (2d) 457, it had been conceded that the articles had no commercial value except for remelting purposes, or, as in *I.C.C. v. B. & O. R. Co.*, *supra*, the character of the commodity was uncontroverted, the mere fact that appellants had inadvertently paid more for the articles than they were worth for remelting purposes or purchased them for reconditioning purposes when in fact the articles were actually only scrap iron having a value only for remelting purposes, would not change their conceded value or uncontroverted character. But such is not the present case. Here, both the value of the articles and their character were disputed issues. In fact the determination of those issues was of controlling im-



portance. A preponderance of the evidence supports the finding of the trial court both as to the value of the articles and their character."

The Circuit Court of Appeals ruled soundly and without conflict with any decision of this Court. The first specification of petitioners' brief is without merit and presents no question for review by this Court.

## II.

**The Circuit Court of Appeals did not err in the holding that no reversible error was committed in admitting in evidence the decision of the Interstate Commerce Commission in *Crancer, et al. v. Abilene & Southern Ry. Co., et al.*, 223 I.C.C. 375 (R. 190-195), and the ruling presents no question for review.**

Petitioners appear to argue that the decision of the Interstate Commerce Commission upon their complaint of the reasonableness of class or commodity rates upon shipments similar to those in the case at bar, determined against them by the Commission on August 6, 1937 (223 I.C.C. 375, R. 190-195), was inadmissible because it was not *res adjudicata* as to character of the shipments and the applicable rates in the case at bar. They cite no decision of this Court on the point and rely solely upon a District Court decision cited on page 16 of their brief to the effect that a judgment as to the character of one shipment is not *res adjudicata* as to the character of another shipment.

Of course the Interstate Commerce Commission decision in question was not *res adjudicata*. It was not offered as determining the case at bar but merely as evidence of the valid tariff provisions (R. 189, 190, 195). It was competent evidence and clearly admissible. *Lowden, et al., v. Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 519-520; *A. J. Phillips Co. v. Grand Trunk W. Ry. Co.*, 236 U.

S. 662, 664; *Robinson v. B. & O. Rd. Co.*, 222 U. S. 506, 511, 512.

The Circuit Court of Appeals sufficiently disposed of the point as follows (R. 347):

"Since the case was tried without a jury, we can see no possible prejudice to appellants by the consideration of the opinion of the Commission by the Court as evidence, rather than by an examination of the same opinion in his library. There is no suggestion that the latter course would have been improper. The trial court did not treat the opinion as being *res adjudicata*. There was no error in calling it to the Court's attention."

Even had the admission of the decision been error the error would have been harmless since the Court's findings and judgment were supported by sufficient and abundant competent evidence. Rule 61, Federal Rules of Civil Procedure; *Martin v. Ihmsen*, 21 Howard 394, 395; *Mammoth Mining Co. v. Salt Lake Foundry & Machine Co.*, 151 U. S. 447, 451; *Anderson v. United States*, 8 Cir., 65 F. (2d) 870, 872; *Wall v. United States*, 10 Cir., 97 F. (2d) 672, 673-4; *Jackson Furniture Co. v. McLaughlin*, 9 Cir., 85 F. (2d) 606, 609.

Petitioners' Point II is wholly without merit and involves no possible ground for review by this Court.

### III.

**Petitioners' specification that the District Court should not have proceeded with the trial of the case while petitioners' second complaint before the Interstate Commerce Commission in respect to the reasonableness of tariff rates was pending, is without merit and raises no question for review by this Court.**

Petitioners' complaint before the Interstate Commerce Commission (R. 17-24) which they contend should have

postponed or stayed the trial of the case at bar raised the same question before the Commission which the Commission decided against petitioners in *Crancer, et al., v. Abilene & Southern Ry. Co.*, 223 I.C.C. 375 (R. 190-195). They have contended that the adjudication of the Commission against them in the former case was not even admissible in evidence in the case at bar. They say that their second complaint before the Commission was filed on March 10, 1939. The record discloses that petitioners' motion for stay in which they set up the complaint avers that the complaint was filed on or about March 16, 1939 (R. 14), which is the same day the petition in the case at bar was filed in the District Court (R. 3). In any event the complaint which they say should have stayed this court action by respondents to collect the lawful freight charges provided by the existing tariffs, was filed on the same day or shortly before the petition of respondents. If a suit or threatened suit or claim could be stayed by the mere filing of a complaint to the Interstate Commerce Commission attacking the reasonableness of lawful rates before the Interstate Commerce Commission, it would be impossible for the rail carriers to make prompt collection of undercharges shown by established and existing freight tariffs from such shippers as had ingenuity enough to file complaints to the Commission. This would result in discrimination and manifestly cannot be the law.

The decisions of this Court upon which petitioners rely in support of their contention that the present lawsuit should have been stayed, are all cases involving administrative questions necessary to be determined in the first instance by the Interstate Commerce Commission. *Great Northern Ry. Co. v. Merchants' Elevator*, 59 U. S. 285, was a suit by a shipper for reparation or damages as for the collection of unreasonable and unlawful rates.

Recovery was denied the shipper on the ground that the shipper as well as the carrier was bound by the rates fixed by the tariffs on file with the Commission, unless and until the Commission held those rates unreasonable and set them aside. The case is authority against petitioners since the case at bar is a suit upon tariffs regularly on file with the Commission which had not been declared unreasonable by the Commission. *Robinson v. B. & O. Rd. Co.*, 222 U. S. 506, also relied upon by petitioners, is similar to the Great Northern Railway Company case and similarly authority against petitioners. *Texas & Pacific Railway Co. v. American Tie & Timber Co.*, 234 U. S. 138, relied upon by petitioners, involved the question of the rate on cross ties which was not clearly fixed by any tariff on file and had never been determined by the Commission. The tariffs definitely and clearly fixed rates on thread protecting rings of value for purposes other than remelting and not scrap iron having value for remelting purposes only, and the Commission had previously determined that said tariff provisions sued upon by respondents were reasonable and applicable to shipments such as the evidence disclosed those in question to be, in *Crancer, et al. v. Abilene & Southern Ry. Co. et al.*, 223 I.C.C. 375. Review was denied in *Crancer v. United States*, D. C. Mo., 23 Fed. Supp. 390, affirmed 305 U. S. 567.

*General American Tank Corp. v. Eldorado Terminal Co.*, 308 U. S. 422, the remaining case cited by petitioners, was an action by a shipper to recover compensation for freight cars furnished for transportation of its products. Under the existing tariffs and rules of the Interstate Commerce Commission compensation for the use of the cars was required to be paid to the car company from which the shipper leased them. This Court held that the shipper must first apply to the Interstate Commerce

Commission and obtain a change by the Commission in the tariffs and rules, before relief could be obtained (308 U. S. l. c. 431). In other words, the shipper had to obtain relief from the Commission in the first instance because it was seeking relief contrary to the existing tariffs and rules of the Commission.

Unless and until tariffs filed with the Commission have been superseded by a final order of the Commission the tariff rate is the lawful rate, it is the duty of the carrier to collect the full tariff rate, and unlawful for the carrier to acquiesce in anything less than the full tariff rate. *Pennsylvania R. R. v. International Coal & Mining Co.*, 230 U. S. 184, 197; *Lowden, et al., Trustees, v. Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 520.

In the *International Coal Mining Company* case the Court said (230 U. S. l. c. 197):

"The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

In the *Lowden* case the Court said (306 U. S. 520):

"Until changed, tariffs bind both carriers and shippers with force of law."

If the carrier has collected less than the current tariff rate it is its duty to sue for the balance and there is no defense to such suit. *Pittsburgh, etc., R. R. v. Fink*, 250 U. S. 577.

It was the right and the duty of the respondents to enforce the lawful rates fixed by the existing tariffs.



They have exercised that right and fulfilled that duty, and obtained a judgment based upon the existing tariffs for lawful charges fixed thereby.

Petitioners have attached as an appendix to their petition and brief, pages 23 to 34, a decision of the Commission upon petitioners' last complaint of the reasonableness of the existing tariffs, handed down by the Commission on February 18, 1941. In their petition and also at page 18 of their brief they refer to it as an effective and current ruling of the Commission, although as pointed out in our statement of the case a certified copy of the subsequent proceedings of the Commission which we have filed with the clerk of this Court discloses that the decision has been suspended and the case set down for further hearing. If this decision of the Commission were final the reference to it would be outside the record and the decision could not be considered for the purpose of impeaching the judgment which became final before it was rendered. *Realty Acceptance Corp. v. Montgomery*, 284 U. S. 547, 551. If it were a final decision petitioners would have a complete remedy under it by way of reparation upon payment of the judgment in question. *Pennsylvania Railroad v. International Coal & Mining Co.*, 230 U. S. 184, 197. If petitioners finally succeed in obtaining some modification of the tariffs by the Commission, which would affect the charges here in judgment, petitioners will have a complete remedy by reparation to the extent of the modification of the rates granted. It is to be observed that the decision of the Commission of February 18, 1941, referred to by petitioners, holds against petitioners' claim that scrap iron rates are applicable but names an intermediate rate as reasonable. Should such a ruling finally be adopted and become final petitioners would be entitled to reparation only as to part of the judgment here involved.

The Circuit Court of Appeals disposed of petitioners' point that the action should have been stayed pending petitioners' currently filed complaint to the Commission of the reasonableness of the rates as follows (R. 347-8):

"Appellants' last contention is that the Court should not have proceeded with this trial because there was pending at the time a proceeding before the Interstate Commerce Commission involving the reasonableness of the rates on used pipe thread protectors. The mere statement of the question suggests the answer. The reasonableness of the rates was not an issue in this case. The issue was one of classification and the application of the existing tariffs in accordance with what the facts disclosed the commodity actually was. 'Until changed the tariffs bound both carriers and shippers with the force of law.' *Lowden v. Simonds, etc., Grain Co.*, 306 U. S. 516, l. c. 520. Even if, as indicated by counsel in oral argument, the Interstate Commerce Commission determined that the existing rates prescribed on used pipe thread protectors was unreasonable, fixed another rate therefor, and granted reparation rights, this action does not fail. *Lowden v. Simonds, etc.; Grain Co., supra*. There was no administrative problem involved, the determination of which is committed to the Interstate Commerce Commission, hence the case of *General American Tank Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, and others of similar import, are inapplicable."

The Court ruled soundly and in accord with all the applicable decisions of this Court. The third and last point of petitioners' brief is without merit and raises no question for review.

**Conclusion.**

It is respectfully submitted, that no question for review is presented by petitioners and that their petition should be denied.

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*Counsel for Respondents, Frank O. Lowden,  
James E. Gorman and Joseph B. Fleming,  
Trustees of The Chicago, Rock Island and  
Pacific Railway Company, a Corporation.*

Kansas City, Missouri,  
September 8, 1941.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1941.

No. 505

LESTER A. CRANCER and GEORGE B. FLEISCH-  
MAN, Co-Partners, Doing Business Under the Firm  
Names of Valley Steel Products Company and Mid-  
Valley Steel Company, Respectively, *Petitioners and*  
*Appellants Below,*

VS.

FRANK O. LOWDEN, JAMES E. GORMAN and  
JOSEPH B. FLEMING, Trustees of the Chicago,  
Rock Island and Pacific Railway Company, a Cor-  
poration, *Respondents and Appellees Below.*

**RESPONDENTS' BRIEF.**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1941.

No. 505

LESTER A. CRANCER and GEORGE B. FLEISCH-  
MAN, Co-Partners, Doing Business Under the Firm  
Names of Valley Steel Products Company and Mid-  
Valley Steel Company, Respectively, *Petitioners and*  
*Appellants Below,*

VS.

FRANK O. LOWDEN, JAMES E. GORMAN and  
JOSEPH B. FLEMING, Trustees of the Chicago,  
Rock Island and Pacific Railway Company, a Cor-  
poration, *Respondents and Appellees Below.*

**RESPONDENTS' BRIEF.**

**THE OPINIONS OF THE COURTS BELOW.**

No opinion was filed by the District Court. The  
opinion of the Circuit Court of Appeals is reported,  
*Crancer, et al. v. Lowden, et al.*, 8 Cir., 121 F. (2d) 645.

**JURISDICTION.**

Respondents respectfully insist that the petition for  
certiorari does not present a question for review by  
this Court.

## STATEMENT OF THE CASE.

Petitioners have served no brief since their petition was granted. This brief will therefore be directed to their petition and their brief filed therewith.

Petitioners' statement of the matter involved is inaccurate, incomplete and obscure.

The case is well stated by the Circuit Court of Appeals in its opinion (R. 341-346, 121 F. (2d)), from which we quote, with footnotes citing supporting pages of the record, as follows:

"This appeal is from a judgment in favor of the Trustees of the Chicago, Rock Island and Pacific Railroad Company, and against appellants, Lester A. Crancer and George B. Fleischman, co-partners doing business under the firm names of Valley Steel Products Company and the Mid-Valley Steel Company respectively, for shipping charges on steel pipe thread protectors. The case was tried without a jury. At the conclusion of the trial the Court made findings of fact and stated conclusions of law, in writing, and entered judgment in favor of appellees for the sum of \$2,263.47.<sup>1</sup>

"The present controversy involves the proper classification of the commodity under the existing tariffs.<sup>2</sup> The shipments, seven car loads, moved from points in Montana, Texas, California and Louisiana where appellants had billed the cars to themselves at St. Louis, Missouri.<sup>3</sup> The billings classified the contents of the cars as 'scrap iron' and the tariff charge applicable to that classification was paid. When the shipments arrived at St. Louis, appellees' rate clerk

1. (R. 3-10, 29, 32, 292-5, 302-3.)

2. (R. 4-10, 12-13.)

3. (R. 25-29.)

requested the Western Weighing and Inspection Bureau to inspect the contents of the cars. That inspection resulted in a rating of the shipments as pipe fittings.<sup>4</sup> The classification 'pipe fittings' included thread or pipe protector rings.<sup>5</sup> The tariff rate on scrap iron being less than the rate on pipe thread protector rings, demand was made upon appellants for the difference on the tariff. Refusal to comply with that demand resulted in this action.<sup>6</sup>

\* \* \* \* \*

"The commodity in question, referred to in various terms such as 'pipe protectors,' 'pipe fittings,' 'pipe thread protectors,' 'protecting rings,'<sup>7</sup> were found by the trial court to be used 'iron pipe thread protecting rings.'<sup>8</sup> These articles are used to protect the threads and the ends of pipe from injury in handling or shipment.<sup>9</sup> Appellants are engaged in the business of purchasing the used articles, repairing and re-selling them. All of the shipments were of the used articles which were being sent to appellants' plant at St. Louis.<sup>10</sup> The repairing or re-conditioning process consisted in a general way in a patented process of straightening those which were not too badly damaged and refinishing the threads. The remainder were useless except for re-melting.<sup>11</sup> One of the appellants, testifying on direct examination, indicated that approximately ninety per cent of the articles contained in these shipments could possibly be repaired for use.<sup>12</sup> On cross examination he stated that approximately sixty per cent were repaired and the remaining forty per cent discarded for re-melting.<sup>13</sup> There was other evidence to the same effect.<sup>14</sup> The articles were shipped in open coal cars. The good and bad were co-mingled, were

4. (R. 36-40, 133.)
5. (R. 109, 110, 112-122, 128-137, 190-196.)
6. (R. 25-29.)
7. (R. 42, 55, 90, 93, 123.)
8. (R. 293.)
9. (R. 42, 90, 92, 123.)
10. (R. 215-223, 220-238, 245.)
11. (R. 199-209.)
12. (R. 210-211.)
13. (R. 237.)
14. (R. 161-176.)



loose in the cars, and none were bound or tied together in any way.<sup>15</sup> The tariff contained a provision that when a number of different articles were co-mingled in a car all should take the rating of the highest classed or rated article in the car.<sup>16</sup> The reclassification was based upon the following item of the tariff: 'Pipe Fittings:—rings, thread protecting, iron in packages.'<sup>17</sup> Appellants' proof tended to show that the thread protecting rings were made of steel. It is their contention that therefore the commodity did not fall within the classification of 'iron' pipe thread protecting rings. Numerous metal objects were elsewhere classified under the heading 'Iron or Steel.' That heading does not appear above the item 'Pipe Fittings' quoted above. There is, however, a tariff provision as follows: 'Unless the contrary appears, the word "iron" wherever used in this classification includes, also, steel; and vice-versa.'<sup>18</sup> Another provision of the tariff provided for a ten per cent penalty for shipment of articles such as these loose or uncrated and not in packages.<sup>19</sup> There was no difference in tariff rates on new and on used pipe protecting rings.<sup>20</sup>

"The classification relating to scrap iron provided that it should apply only to iron or steel having value for remelting purposes only."<sup>21</sup>

\* \* \* \* \*

"The trial court found that the shipments were not of scrap iron or steel possessing value only for re-melting purposes, but were of used iron pipe thread protecting rings."<sup>22</sup>

\* \* \* \* \*

"The argument is advanced that the finding should be set aside because there was no proof that

15. (R. 47, 52-3, 72, 82-3, 88, 90-93, 96, 103, 123, 127, 138-142.)

16. (R. 130-131, 190-196.)

17. (R. 109, 110, 112-122, 128-137, 190-196.)

18. (R. 153, 286.)

19. (R. 113-119, 121, 128-9, 190-196.)

20. (R. 194, 290.)

21. (R. 132-3, 157-9, 190-196, 285-292.)

22. (R. 293, 294.)

the articles had a market or commercial value for any purpose other than for remelting. Appellants' evidence showed that these seven and a great many more carloads of pipe thread protectors were purchased by them for reconditioning purposes.<sup>23</sup> There was substantial evidence that a fairly well established price existed for used pipe thread protectors in the territory where they were available.<sup>24</sup> \* \* \*

\* \* \* In addition to the evidence showing the purpose for which appellants purchased the articles and the use to which they were put, there is an abundance of testimony to the effect that the articles were used pipe thread protectors, having an established market value as such, as distinguished from mere scrap iron.<sup>25</sup> \* \* \*

\* \* \* "The evidence is uncontroverted that the major portion of each carload of the shipments involved were used pipe thread protecting rings and were shipped loose and commingled in the cars.<sup>26</sup> As heretofore demonstrated the proof justified the classification of the major portion of each shipment as pipe fittings consisting of used iron pipe thread protecting rings and not as scrap iron having a value for remelting purposes only.

"The Tariff heretofore quoted in the margin provided that when articles were shipped in a mixed carload the classification applicable to the highest classed or rated article in the car should apply.<sup>27</sup> \* \* \*

As stated by petitioners, respondents, plaintiffs in the District Court, introduced in evidence at the trial, over objection of petitioners, defendants, the opinion and report

23. (R. 199-209, 220-238, 245, 257-268.)

24. (R. 161-176, 220-238, 245.) 254

25. (R. 161-176, 199-209, 220-238, 245.) 254

26. (R. 47, 52-3, 72, 82-3, 88, 90-93, 96, 103, 123, 127, 138-9, 142, 210-211, 237.)

27. (R. 130-131.)

of the Interstate Commerce Commission in the case of *Crancer, et al. v. Abilene & Southern Railway Company, et al.*, 223 I. C. C. 375 (R. 190-195). That case involved a complaint before the Commission, filed by the defendants against a number of railroads, in which the defendants asserted that shipments of iron or steel thread protecting rings similar to the shipments involved in the case at bar should be classified under the freight tariffs as scrap iron and that class or commodity rates on pipe fittings were inapplicable and unreasonable. The Commission, on August 6, 1937, held scrap iron rates inapplicable and class or commodity rates on pipe fittings applicable and reasonable, and dismissed the complaint (R. 190-195, 223 I. C. C. 375).

It may also be stated that on March 10, 1939, the defendants filed with the Interstate Commerce Commission another complaint similar to the one dismissed by the Commission on August 6, 1937, again complaining that rates on used iron or steel pipe fitting protecting rings in excess of scrap iron rates were unreasonable and inapplicable (R. 14, 17-24); that by motion for stay filed and denied in the District Court before trial (R. 14, 24-25), by application to the Circuit Court of Appeals for prohibition filed and denied by that Court before trial (R. 25, 33), and by objection made and overruled at the beginning of the trial of the case at bar on January 31, 1940, to February 7, 1940 (R. 32-34), defendants sought the postponement or stay of the trial of the case until the determination by the Interstate Commerce Commission of the second last mentioned complaint of defendants.

At page 6 of their petition petitioners refer to a decision of the Interstate Commerce Commission on February 18, 1941, upon the said second complaint of the petitioners before the Commission, and attach as an ap-

pendix to their petition and brief, pages 23 to 34, the decision of the Commission so referred to, in which it was again held that scrap iron rates were not applicable to shipments such as those in suit but that class or commodity rates were in part unreasonable.

The reference to this decision of the Interstate Commerce Commission of February 18, 1941, following the completion of the trial in the case at bar and the judgment entered on February 7, 1940 (R. 302,3), is of course a reference to matter outside of the record. The reference to this decision of the Interstate Commerce Commission as an effective and current ruling of the Commission is also lacking in candor. As appears from a certified copy of the subsequent proceedings of the Commission, which we have filed with the clerk of this Court, the decision of February 18, 1941, was suspended and the case set down for further hearing.

## .ARGUMENT.

The petition for certiorari (page 7) refers the Court to the rambling and obscure statement of the "Matter Involved" for the "Questions Presented." As "Reasons Relied On for the Allowance of the Writ," the petition merely avers that the opinion of the Circuit Court of Appeals decided a Federal question in a way in conflict with applicable decisions of this Court and cites a number of decisions, without indicating the questions ruled or the respect in which it is claimed that the opinion of the Circuit Court of Appeals is in conflict with the decisions cited, other than to refer the Court to the brief of petitioners in support of the petition. The brief (pages 9 to 21) sets out and argues three specifications of error. Paragraph 2 of Rule 38 of this Court permits a brief in support of a petition for certiorari, but the petition must be complete in itself and the requirements for the petition prescribed by the rule cannot be supplied by the supporting brief. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 177-8; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 357.

If however, the petition be deemed sufficient to raise the points mentioned and argued in petitioners' brief, we respectfully insist that the points are without merit and present no question for review by this Court. We discuss them in the order in which they are set out in petitioners' brief.

### I.

The Circuit Court of Appeals did not err in sustaining the judgment for additional freight charges. The



findings of fact and judgment were supported by evidence that a substantial and major portion of each shipment was used pipe thread protecting rings, having an established market value as such and not of value for remelting purposes only, as well as by evidence that the shipments in question and all other shipments were purchased by defendants for reconditioning and sale without remelting, and that from sixty to ninety per cent of each of the shipments in question were actually reconditioned by defendants for resale, without remelting. The Circuit Court of Appeals ruled in conformity with the applicable decisions of this Court and not in conflict with any of its decisions.

Petitioners argue that the District Court "must have based its judgment upon the theory" that the shipments were not scrap "because they were not used as scrap for remelting purposes only," because the trial court stated orally at the trial that he did not think that the shipments were "scrap iron" and observed that "the course of dealing, over a long period of time, shows that; as a matter of fact, it never was used in that way" (R. 292).

The trial court expressly found (R. 293-4), and the evidence abundantly established, that the tariffs applicable to all the shipments provided rates for shipments of pipe fittings described as iron or steel thread protecting rings (R. 109, 110, 112-122, 128-137, 190-196); that the tariffs provided that when a number of different articles were commingled in a car all should take the rating of the highest classed or rated article in the car (R. 130-131, 190-196); that each of the carload shipments involved contained iron or steel thread protecting rings so described in the tariffs (R. 47, 52-3, 72, 82-3, 88, 90-93, 96, 103, 123, 127, 132-9, 142); that the tariffs applicable to shipments between the points in question provided that ratings on scrap iron or steel applied only to iron or steel having value for remelting purposes only (R.

132-3, 157-9, 190-196, 285-292); that the iron or steel thread protecting rings in the seven shipments were not iron or steel having value for remelting purposes only (R. 47, 52-3, 82-3, 88, 90-93, 103, 123, 127, 138-9, 161-176, 199-209, 220-238, <sup>254</sup>245).

These findings of fact are abundantly supported by the evidence. Indeed, there was no evidence to the contrary and petitioners do not contend for any.

As pointed out by the Circuit Court of Appeals (R. 344-5), the findings that the shipments were used thread protecting rings and not scrap iron or steel of value for remelting purposes only, are supported not only by defendants' own evidence that the shipments in question and a great many similar shipments were purchased by defendants for reconditioning purposes without remelting and from sixty to ninety per cent of each of the shipments in question were actually reconditioned for resale as used protecting rings by defendants without remelting (R. 199-209, 220-238, <sup>254</sup>245, 257-268), but also by an abundance of evidence (by both parties) to the effect that the articles were used pipe thread protectives, having an established market value as such, as distinguished from mere scrap iron (R. 161-176, 199-209, 220-238, <sup>254</sup>245).

Petitioners could not complain of the findings of fact and judgment even if the testimony as to the purpose for which petitioners were buying the shipments in question and other shipments, and the use to which they in fact put these shipments and other similar shipments, had been incompetent and inadmissible, since, as above pointed out, the findings and judgment were amply supported by other evidence, of both parties, that the shipments in question contained pipe thread protecting rings having an established market value as such, as distinguished from mere scrap iron (R. 161-

176, 199-209, 220-238, 245). Rule 61, Federal Rules of Civil Procedure; *Martin v. Ihmsen*, 21 Howard 394, 395; *Mammoth Mining Co. v. Salt Lake Foundry & Machine Co.*, 151 U. S. 447, 451; *Anderson v. United States*, 8 Cir., 65 F. (2d) 870, 872; *Wall v. United States*, 10 Cir., 97 F. (2d) 672, 673-4; *Jackson Furniture Co. v. McLaughlin*, 9 Cir., 85 F. (2d) 606, 609. Supported as they are by substantial and abundant competent evidence the concurrent findings of fact of the District Court and the Circuit Court of Appeals are conclusive. *Virginian Railway Co. v. Federation*, 300 U. S. 515, 542, and cases cited; *United States v. O'Donnell*, 303 U. S. 501, 508, and cases cited; Rule 52(a) Federal Rules of Civil Procedure.

There is, however, no merit to the contention of petitioners that the evidence as to the use to which the shipments in question and other shipments were put was not competent and material, and proper basis for a finding that the shipments in question were not scrap iron, having value for remelting purposes only.

In support of their argument petitioners cite two decisions by this Court, *Interstate Commerce Commission v. Delaware, Lackawanna & Western Railroad*, 220 U. S. 235, and *Interstate Commerce Commission v. Baltimore & Ohio Railroad*, 225 U. S. 326. In the Lackawanna case it was held that the manner in which shipments of definitely identified articles were owned and assembled for shipment in one car could not change the shipment from a carload shipment as designated in the tariffs. In the Baltimore & Ohio case it was held that the mere fact that coal which was the subject of shipment belonged to a railroad could not change or destroy the classification of the coal under the tariffs; that the tariffs provided rates for the shipment of coal regardless of whether owned by a dealer or a railroad.

Neither of these cases has any application or in anywise supports petitioners' argument. The character and classification of the articles in shipment, under the tariffs, was a matter in dispute in the case at bar. The evidence as to the use for which the articles were purchased and to which they were put, was material and competent, not for the purpose of changing the character and classification of the articles, but for the purpose of determining their character and classification. The two decisions cited by petitioners do not hold, and this Court has never held, that the use to which articles are put is not some evidence of the character of the articles.

It is not necessary to consider whether the two Interstate Commerce Commission cases cited on pages 12 and 13 of petitioners' brief support petitioners' contention. If they did there would still be involved no ruling of the Circuit Court of Appeals in conflict with applicable decisions of this Court. Nor would they establish any applicable rule or decision of the Interstate Commerce Commission. In the more recent decisions of the Commission upon the very question now raised by petitioners, upon the petitioners' own complaint, the Commission ruled the contention against petitioners:

"In *Wisconsin Waste & Wiper Co. v. Chicago & N. W. Ry. Co.*, 196 I. C. C. 459, 460, Division 5 said the use to which a commodity is put is not determinative of the applicable rate, but that the use may be considered in determining the nature of the commodity" (*Crancer, et al. v. Abilene & Southern Railway Co.*, 223 I. C. C. 375, R. 192).

At page 10 of their brief petitioners refer to testimony by one of the petitioners that he assembled at petitioners' plant and loaded and shipped to a mill for remelting purposes a car of thread protectors (R. 247-8). Petitioners themselves thus appear to argue that the use to which this particular car of thread protectors was

put, to-wit, remelting, established the character of the shipment as scrap iron, having value for remelting purposes only. We concede that the use for which it was shipped and to which it was put was evidence that that particular shipment was scrap iron. The shipment so testified to by the petitioner was doubtless a shipment of rings which he could not recondition and which was therefore, in fact of value for remelting purposes only, and, therefore, scrap iron. Petitioner did not testify that this car which he shipped as scrap iron was made up of any of the protectors involved in the shipments in question, nor would it have mattered if it had been, since the shipments in suit contained substantial quantities of thread protectors which had value other than for remelting purposes and since the highest classified article controlled as to the rate on each car.

It is of course to be pointed out that the evidence as to the use for which the shipments in question and other shipments of like character were put was not merely evidence of a casual or accidental use. On the contrary, the evidence in question was to the effect that the shipments in question and many other similar shipments were purchased by defendants for the purpose of reconditioning, without remelting, and that from sixty to ninety per cent of the shipments in question and other shipments of like character to petitioners and others over a period of years were capable of being reconditioned and were in fact reconditioned without remelting, for sale as used thread protecting rings. (R. 199-209, 220-238, 245, 257-268, 161-176).

The Circuit Court of Appeals disposed of the contention of petitioners in the following manner (R. 345-6, 121 F. (2d) 649):

"It is further contended that the finding that the pipe thread protectors did not possess a commercial or market value for remelting purposes only,



was based solely upon testimony that appellants purchased the articles for reconditioning purposes and not for remelting purposes. Obviously, if the articles were scrap iron fit for remelting purposes only, their purchase by appellants for another purpose would not change the character of the articles. Nor should one rate be applied to the shipment of an article to be used for one purpose and another rate be applied to the shipment of the same article when it is to be used for another purpose. *Interstate Commerce Commission v. Baltimore & Ohio Ry. Co.*, 225 U. S. 326. But evidence of the use for which the articles were purchased and the use to which they were actually put was properly considered in determining what they actually were. In addition to the evidence showing the purpose for which appellants purchased the articles and the use to which they were put, there is an abundance of testimony to the effect that the articles were used pipe thread protectors, having an established market value as such, as distinguished from mere scrap iron. If, as in *A. T. & S. F. R. Co., et al. v. U. S. ex rel. Sonken-Galamba Co.*, 98 F. (2d) 457, it had been conceded that the articles had no commercial value except for remelting purposes, or, as in *I. C. C. v. Baltimore & Ohio R. Co.*, *supra*, the character of the commodity was uncontroverted, the mere fact that appellants had inadvertently paid more for the articles than they were worth for remelting purposes or purchased them for reconditioning purposes when in fact the articles were actually only scrap iron having a value only for remelting purposes, would not change their conceded value or uncontroverted character. But such is not the present case. Here, both the value of the articles and their character were disputed issues. In fact the determination of those issues was of controlling importance. A preponderance of the evidence supports the finding of the trial court both as to the value of the articles and their character."

It is submitted that the Circuit Court of Appeals ruled soundly and without conflict with any decision of

this Court; that the first specification of petitioners' brief is without merit and presents no question for review by this Court.

## II.

The Circuit Court of Appeals did not err in the holding that no reversible error was committed in admitting in evidence the decision of the Interstate Commerce Commission in *Crancer, et al. v. Abilene & Southern Ry. Co., et al.*, 223 I. C. C. 375 (R. 190-195), and the ruling presents no question for review.

Petitioners appear to argue that the decision of the Interstate Commerce Commission upon their complaint of the reasonableness of class or commodity rates upon shipments similar to those in the case at bar, determined against them by the Commission on August 6, 1937 (223 I. C. C. 375, R. 190-195), was inadmissible because it was not *res adjudicata* as to character of the shipments and the applicable rates in the case at bar. They cite no decision of this Court on the point and rely solely upon a District Court decision cited on page 16 of their brief to the effect that a judgment as to the character of one shipment is not *res adjudicata* as to the character of another shipment.

Of course the Interstate Commerce Commission decision in question was not *res adjudicata* as to the character of the shipments in question. It was not offered as determining that issue but merely as evidence of the valid tariff provisions (R. 189, 190, 195). It was competent evidence and clearly admissible. *Lowden, et al., v. Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 519-520; *A. J. Phillips Co. v. Grand Trunk W. Ry. Co.*, 236 U. S. 662, 664; *Robinson v. Baltimore & Ohio R. Co.*, 222 U. S. 506, 511, 512.

The Circuit Court of Appeals sufficiently disposed of the point as follows (R. 347):

"Since the case was tried without a jury, we can see no possible prejudice to appellants by the consideration of the opinion of the Commission by the Court as evidence, rather than by an examination of the same opinion in his library. There is no suggestion that the latter course would have been improper. The trial court did not treat the opinion as being *res adjudicata*. There was no error in calling it to the Court's attention."

Even had the admission of the decision been error, the error would have been harmless since the Court's findings and judgment were supported by sufficient and abundant competent evidence. Rule 61, Federal Rules of Civil Procedure; *Martin v. Ihmsen*, 21 Howard 394, 395; *Mammoth Mining Co. v. Salt Lake Foundry & Machine Co.*, 151 U. S. 447, 451; *Anderson v. United States*, 8 Cir., 65 F. (2d) 870, 872; *Wall v. United States*, 10 Cir., 97 F. (2d) 672, 673-4; *Jackson Furniture Co. v. McLaughlin*, 9 Cir., 85 F. (2d) 606, 609.

It is submitted that petitioners' Point II is without merit and involves no ground for review by this Court.

### III.

**Petitioners' specification that the District Court should not have proceeded with the trial of the case while petitioners' second complaint before the Interstate Commerce Commission in respect to the reasonableness of tariff rates was pending, is without merit and raises no question for review by this Court.**

The case before the Court is a suit by respondents for *undercharges*, alleged and found to be *due from petitioners under tariffs on file with the Interstate Commerce Commission*. Petitioners are contending that the trial of this case should have been stayed pending the determination by the Interstate Commerce Commission of a *complaint filed by petitioners before the Commission*, which asked the Commission to *find and declare the*

*tariff rates in question unreasonable and to award reparation as to all charges collected by respondents and other carriers based on the tariffs in question (R. 17-25).*

This complaint before the Interstate Commerce Commission, which petitioners contend should have stayed the trial in the case at bar, was the *second complaint* filed by petitioners before the Commission attacking the reasonableness of the *same tariffs*, on the *same grounds*, and as applicable to the *same character of shipments*. The *first complaint* was *dismissed by the Commission on August 6, 1937, in a decision holding the rates not unreasonable* (R. 190-195, *Erancer et al. v. Abilene & So. Ry. Co. et al.*, 223 I. C. C. 375). This is the decision of the Commission which petitioners contend, in their Point II, should not have been admitted in evidence.

The shipments in question moved in a period immediately preceding and following the August 6, 1937 decision of the Commission dismissing petitioners' first complaint, to wit, in June, July and August of 1937 (R. 25-29). It thus appears that petitioners were fully advised of the rate question involved when they made the shipments. In securing the billing of the shipments as scrap iron, without a decision of the Commission declaring the tariff provisions unreasonable, petitioners did not act in good faith, unless the shipments were in fact scrap iron, or unless petitioners believed them to be scrap iron. The evidence disclosed (R. 47, 52-3, 82-3, 88, 90-93, 103, 123, 127, 138-9, 161-176, 199-209, 220-238, 245) and the Court found (R. 294), that they were not in fact scrap iron. Petitioners' own evidence (R. 199-209, 220-238, 245, 257-268), disclosed that petitioners selected and purchased the shipments for reconditioning and resale without remelting, and because, to use the language of the Circuit Court of Appeals, (R. 345, 121

F. (2d) 649) "the articles were used pipe thread protectors having an established market value as such, as distinguished from mere scrap iron."

A three-judge Court dismissed petitioners' bill to enjoin the decision of the Commission on the petitioners' first complaint, *Crancer et al. v. United States et al.*, D. C. Mo. 23 F. S. 690. The learned trial judge in the case at bar was a member of that Court and therefore had judicial knowledge of the Commission's decision on the first complaint. (*Freshman v. Atkins*, 269 U. S. 121, 124). This Court affirmed the decree of the three-judge Court, *Crancer et al. v. United States et al.*, 305 U. S. 567.

Petitioners filed their second complaint before the Commission on March 10, 1939 (Petitioners' Brief, p. 17), six days before the institution of the case at bar, on March 16, 1939 (R. 3). The trial court set aside an order which the Court had made granting a continuance of the case, upon a motion of respondents setting out that the petitioners had secured an indefinite continuance of the hearing of their second complaint before the Commission (R. 13-14).

We respectfully submit that the District Court did not exceed its jurisdiction or commit error in refusing to stay the trial of the case on account of the pendency of petitioners' second complaint before the Commission.

The Circuit Court of Appeals disposed of the point that the action should have been stayed as follows (R. 347-8, 121 F. (2d) 650):

"Appellants' last contention is that the Court should not have proceeded with this trial because there was pending at the time a proceeding before the Interstate Commerce Commission involving the reasonableness of the rates on used pipe thread pro-



tectors. The mere statement of the question suggests the answer. The reasonableness of the rates was not an issue in this case. The issue was one of classification and the application of the existing tariffs in accordance with what the facts disclosed the commodity actually was. 'Until changed the tariffs bound both carriers and shippers with the force of law.' *Lowden v. Simonds, etc., Grain Co.*, 306 U. S. 516, 1. c. 520. Even if, as indicated by counsel in oral argument, the Interstate Commerce Commission determined that the existing rates prescribed on used pipe thread protectors was unreasonable, fixed another rate therefor, and granted reparation rights, this action does not fail. *Lowden v. Simonds, etc., Grain Co., supra*. There was no administrative problem involved, the determination of which is committed to the Interstate Commerce Commission, hence the case of *General American Tank Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, and others of similar import, are inapplicable."

It is submitted that the Circuit Court of Appeals ruled soundly and in accord with all the applicable decisions of this Court.

Of similar effect is the decision of the Second Circuit in *Pennsylvania Ry. Co. v. Fox & London*, 2 Cir., 93 F. (2d) 669, 670, certiorari denied 304 U. S. 566. In that case a shipper was sued for undercharges and contended that the Court was without jurisdiction to proceed because the case involved a construction of the published tariffs which required a preliminary determination by the Interstate Commerce Commission. The Circuit Court of Appeals held that there was involved no question of construction requiring determination by the Commission; that the case involved merely a determination of the character of the articles shipped and an application in plain language of the published tariffs. The Second Circuit Court of Appeals pointed out the same distinction between the jurisdiction of the Court and the

jurisdiction of the Commission, which was recognized and followed by the Eighth Circuit Court of Appeals in the case at bar. The District Court was held to have properly exercised jurisdiction, and its judgment for the undercharges sued for was affirmed.

Petitioners' contention that it was "mandatory upon the District Court not to proceed with the trial" pending their second application before the Commission raising the reasonableness of the tariff rates, overlooks the distinction so clearly pointed out by the Circuit Court of Appeals, between the case at bar and a case involving an administrative question such as the Congress has committed in the first instance to the determination of the Interstate Commerce Commission. As pointed out by the Court the case of *General American Tank Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, and others of similar import, relied upon by petitioners, are inapplicable to petitioners' contention.

The earliest case relied upon by petitioners is *Robinson v. Baltimore & Ohio R. R. Co.*, 222 U. S. 506. That was an action by a shipper against a carrier to recover back part of the tariff charges, collected by the carrier, on the ground that the tariff charges were unreasonable. It was held that only the Interstate Commerce Commission could in the first instance hold that tariffs on file were unreasonable, and that unless and until the Commission had held a tariff unreasonable the courts were required to recognize and enforce the tariff as filed. This case is therefore authority against petitioners. Respondents have sued upon, and the District Court and Circuit Court of Appeals have enforced, the existing tariffs. In contending that the pendency of their complaint before the Commission operated to stay relators' action, the petitioners have put the shoe on the wrong foot. In so far as the petitioners complained

of the reasonableness of the tariffs, it was the petitioners who have no standing in court.

Another case relied upon by petitioners is *Great Northern Ry Co. v. Merchants Elevator Co.*, 259 U. S. 285. This was also an action by a shipper against a carrier. The shipper sought to recover part of certain freight charges which had been exacted by the carrier. The carrier contended that the shipper's right to recover depended upon a construction of the tariff which was an administrative question for the determination of the Interstate Commerce Commission in the first instance, and one which could not be passed upon by the Court inasmuch as it had never been determined by the Commission. The Court recognized that if the suit had involved such an administrative question the carrier's position would have been correct, but held that the position was untenable for the reason that the question involved was merely one of the construction of unambiguous language used in its ordinary sense, a question of law for the Court, and not one for the Commission. In the case at bar relators' action for undercharges depended upon no administrative question but merely upon the issue of fact as to whether the articles shipped were used thread protectors within the plain and unambiguous meaning of the tariff provisions, and not scrap iron of value for remelting purposes only.

As said by the Circuit Court of Appeals (R. 347, 121 F. (2d) 650):

"\* \* \* The reasonableness of the rates were not an issue in this case. The issue was one of classification and the application of the existing tariffs in accordance with what the facts disclosed the commodity actually was."

Furthermore, if the tariffs involved in the case could be said to present a case for construction by the

Interstate Commerce Commission, the construction was already made by the Commission when it dismissed petitioners' first complaint (R. 190-195, *Crancer et al. v. Abilene & So. Ry. Co. et al.*, 223 I. C. C. 375, review denied *Crancer et al. v. United States et al.*, D. C. Mo. 23 F. S. 390, affirmed 307 U. S. 567). The judgment appealed from was based on the same construction (R. 293-5), when the Court determined that the shipments in question were iron or steel pipe thread protecting rings, and not iron or steel having value for remelting purposes only (R. 294).

Another case relied upon by petitioners, *Texas & Pac. Ry. Co. v. American Tie & Timber Co.*, 234 U. S. 138, was also an action by a shipper against a carrier for damages. The shipper's right to relief depended upon the construction of words of a tariff, which were not used in their ordinary meaning and therefore presented an administrative question which had to be first determined by the Interstate Commerce Commission. This case is distinguished by *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U. S. 1. c. 294, and what has been said above in pointing out that the Great Northern case does not support petitioners' position.

*General American Tank Corp. v. Eldorado Terminal Co.*, 308 U. S. 422, the remaining case cited by petitioners, was an action by a shipper to recover compensation for freight cars furnished for transportation of its products. Under the existing tariffs and rules of the Interstate Commerce Commission compensation for the use of the cars was required to be paid to the car company from which the shipper leased them. This Court held that the shipper must first apply to the Interstate Commerce Commission and obtain a change by the Commission in the tariffs and rules, before relief could be obtained (308 U. S., 1. c. 431). In other words, the shipper had to ob-

tain relief from the Commission in the first instance because it was seeking relief contrary to the existing tariffs and rules of the Commission.

None of petitioners' cases, therefore, supports their position.

As was held by the Circuit Court of Appeals, unless and until tariffs filed with the Commission have been superseded by a final order of the Commission the tariff rate is the lawful rate, it is the duty of the carrier to collect the full tariff rate, and unlawful for the carrier to acquiesce in anything less than the full tariff rate. *Pennsylvania R. R. v. International Coal & Mining Co.*, 230 U. S. 184, 197; *Lowden, et al., Trustees v. Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 520.

In the *International Coal Mining Company* case the Court said (230 U. S., l. c. 197):

"The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

In the *Lowden* case the Court said (306 U. S. 520):

"Until changed, tariffs bind both carriers and shippers with force of law."

If the carrier has collected less than the current tariff rate it is its duty to sue for the balance and there is no defense to such suit. *Pittsburgh, etc., R. R. v. Fink*, 250 U. S. 577.

It was the right and the duty of the respondents to enforce the lawful rates fixed by the existing tariffs.



They have exercised that right and fulfilled that duty, and obtained a judgment based upon the existing tariffs for lawful charges fixed thereby.

Petitioners have attached as an appendix to their petition and brief, pages 23 to 34, a decision of the Commission upon petitioners' last complaint of the reasonableness of the existing tariffs, handed down by the Commission on February 18, 1941. In their petition and also at page 18 of their brief they refer to it as an effective and current ruling of the Commission, although as pointed out in our statement of the case a certified copy of the subsequent proceedings of the Commission which we have filed with the clerk of this Court discloses that the decision has been suspended and the case set down for further hearing. If this decision of the Commission were final the reference to it would be outside the record and the decision could not be considered for the purpose of impeaching the judgment which became final before it was rendered. *Realty Acceptance Corp. v. Montgomery*, 284 U. S. 547, 551. If it were a final decision petitioners would have a complete remedy under it by way of reparation upon payment of the judgment in question. *Pennsylvania Railroad v. International Coal & Mining Co.*, 230 U. S. 184, 197. If petitioners finally succeed in obtaining some modification of the tariffs by the Commission, which would affect the charges here in judgment, petitioners will have a complete remedy by reparation to the extent of the modification of the rates granted. It is to be observed that the decision of the Commission of February 18, 1941, referred to by petitioners, holds against petitioners' claim that scrap iron rates are applicable but names an intermediate rate as reasonable. Should such a ruling finally be adopted and become final petitioners would be entitled to reparation only as to part of the judgment here involved.

Petitioners say that the trial should have been stayed "as a matter of comity between the courts of this country and the Interstate Commerce Commission."

There was no matter of comity involved. The jurisdiction of the District Court was invoked by suit to enforce the existing tariffs. Such jurisdiction was conferred on the District Court by Section 24 (8) of the Judicial Code (28 U. S. C., Sec. 41) (8). This suit for undercharges was a matter of which the Interstate Commerce Commission has no jurisdiction.

On the other hand, the jurisdiction of the Interstate Commerce Commission over the question of reasonableness of tariff rates raised by petitioners' complaint before the Commission was jurisdiction conferred exclusively on the Commission in the first instance, both as to fixing rates (49 U. S. C., Sections 13 (1) and 15 (7)) and as to reparation on account of tariff charges already collected (49 U. S. C., Sections 13 (1) and 16 (1)).

The jurisdiction of the Interstate Commerce Commission under the second complaint filed by petitioners has been in no wise interfered with by the action of the District Court in rendering judgment for relators for undercharges due under the tariffs as published. To borrow the language of this Court "the only relief" which could be "afforded" petitioners "by the Commission's decision" of the pending complaint of petitioners "is a right to reparation for" the payment under the judgment in the case at bar to such extent as the Commission might find unreasonable the rates upon which the judgment was based (*Lowden, et al. v. Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 521).

While it is clear that the affirmance of the judgment of the District Court could not preclude reparation by the Commission in the event the Commission should find the tariffs in question unreasonable to any extent,

the Circuit Court of Appeals was careful to leave no uncertainty about the matter and very properly affirmed the judgment "without prejudice to such rights as appellants may have or become entitled to for reparation" (R. 348, 121 F. (2d) 650).

It being clear that the District Court had jurisdiction, the question of postponement of the trial involved at most the convenience of the Court and the parties and was at most a matter within the sound discretion of the District Court. It is well settled that the granting or refusing of a continuance is within the discretion of the trial court and not to be interfered with on appeal unless there has been a clear abuse of the discretion. *Guardian Assurance Co. v. Quintana*, 227 U. S. 100.

After the District Court had granted the petitioners a continuance, the Court was clearly justified in setting aside the order when it was made to appear that the petitioners had secured an indefinite continuance of their complaint before the Commission (R. 13-14).

In prosecuting the action for undercharges respondents were complying with the law prohibiting discrimination between shippers and seeking to enforce the published tariffs which had the force and effect of statute. The answer of petitioners denied all the allegations of the complaint (R. 12). By requested findings of fact and conclusions of law (R. 295-302) petitioners sought to have the District Court find that the articles shipped were scrap iron within the meaning of the published tariffs, and that no undercharges were shown under the existing tariffs. In the Circuit Court of Appeals (R. 342, 121 F. (2d) 647) petitioners continued to defend, and sought reversal of the judgment, on the ground that the shipments had not been proved to contain articles for which the published tariffs fixed a rate in excess of the scrap iron rate which petitioners had paid. In this

Court by their Points I and II they are still contending that the District Court erred in holding that the shipments were of such character that class or commodity rates, as distinguished from scrap iron rates, were applicable.

In other words, it conclusively appears that petitioners defended upon the merits and under the published tariffs, although they also sought a stay of the action on account of their complaint to the Commission that the tariffs were unreasonable. It was the duty of the relators, in the prosecution of their action and enforcement of the legal tariffs, to prove that the articles shipped were of a character to which the tariff rates sued upon applied. It was the duty of relators to seek, and the right of relators to be accorded a trial while evidence of the character of the articles shipped was available. Just as it was the duty of relators to prosecute the action with diligence, so it was the duty of the District Court to accord relators a prompt trial. Speaking of the duty of the Courts in such litigations this Court said, in *Lowden, et al. v. Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 521:

"It is equally important to aid the efforts of a carrier in collecting published charges in full. Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates."

We believe it would have been an abuse of discretion for the trial court to have stayed the trial pending petitioners' complaint to the Commission of the reasonableness of the rate. Certain it is, we respectfully submit, that the refusal of the trial court to stay the action did not constitute an abuse of discretion. The correctness of our position is emphasized by the fact that the Commission had already ruled that the tariff rates in question were not unreasonable, when it dismissed petitioners'



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first complaint on August 6, 1937 (R. 190-195, *Crancer, et al. v. Abilene & So. Ry. Co., et al.*, 223 I. C. C. 375).

Since petitioners have a complete and adequate remedy, by way of reparation, in the event they succeed, to any extent, in their efforts to have the Interstate Commerce Commission declare the tariff provisions in question unreasonable, it is manifest that petitioners have suffered no prejudice by the action of the trial court in refusing the prosecution of the stay of the case at bar. Now that relators have obtained a judgment for the lawful charges, after having been put to the expense of proving their case on the merits, we respectfully submit that it would be unjust to relators to reverse their judgment, to require them to pay the costs of the case to date, and to make it necessary for them to again prove their case on the merits after the petitioners' complaint before the Commission has been finally determined. Even more serious, we respectfully submit, would be the effect of a reversal upon the enforcement of the law which requires the collection of legal freight charges promptly and without discrimination. We respectfully submit that if a suit for undercharges due under the existing tariffs could be stayed by the mere filing of a complaint to the Interstate Commerce Commission attacking the reasonableness of the published rates, and even a second complaint after prior adverse ruling of the Commission, uniform enforcement of the law would be impaired and discrimination would necessarily result.

It is submitted that the Circuit Court of Appeals soundly ruled the question.

**Conclusion.**

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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*Counsel for Respondents, Frank O. Lowden,  
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Trustees of The Chicago, Rock Island and  
Pacific Railway Company, a Corporation.*

Kansas City, Missouri,  
January 22, 1942.

FILED

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CHARLES ELMORE CRUPLEY  
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

LESTER A. CRANCER and GEORGE B.

FLEISCHMAN, Co-partners doing business under the firm names of VALLEY STEEL PRODUCTS COMPANY and MID-VALLEY STEEL COMPANY, respectively,

*Petitioners and Appellants below,*

vs.

No. 505.

FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B. FLEMING, Trustees of the CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation,

*Respondents and Appellees below.*

## PETITION FOR REHEARING.

IRL B. ROSENBLUM,  
BERNARD MELLITZ,  
CLYDE W. WAGNER,  
320 North Fourth Street,  
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*Attorneys for Petitioners.*

IN THE  
**Supreme Court of the United States**

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and JOSEPH B. FLEMING, Trustees  
of the CHICAGO, ROCK ISLAND AND  
PACIFIC RAILWAY COMPANY,  
a Corporation,

*Respondents and Appellees below.*

**PETITION FOR REHEARING.**

To the Honorable Harlan F. Stone, Chief Justice of the  
Supreme Court of the United States, and the Asso-  
ciate Justices of the Supreme Court of the United  
States:

Come now Lester A. Crancer and George B. Fleischman,  
co-partners doing business under the firm names of Valley

Steel Products Company and Mid-Valley Steel Company, respectively, and respectfully pray this Honorable Court to grant a rehearing in the above-entitled cause, and for grounds for said petition, Petitioners state that the opinion of this Honorable Court delivered by Mr. Justice Byrnes did not consider an essential and important point raised by Petitioners in their Petition for Writ of Certiorari in the first Specifications of Errors (p. 9 of Petition for Writ of Certiorari). The first Specification of Errors is as follows:

"I. That the Circuit Court of Appeals erred in sustaining the judgment of the District Court in favor of Respondents and against the Petitioners for additional freight charges in that said judgment was based upon the use to which the articles were put by the Petitioners after they had received them from the Respondent railroad carriers."

It was pointed out in Petitioners' application for Writ of Certiorari that the basis of the decision of the District Court in favor of Respondents and against Petitioners was the use to which the articles were put by Petitioners after they had been received from respondent railroad company.

In connection with the argument which appears on pps. 10 to 15 of the original Brief in Support of the application for Writ of Certiorari, there was cited a statement by the District Court as follows:

"There is no doubt in my mind at all in this matter. I do not think this is scrap iron. I do not believe that they are entitled to that rate and the course of dealing, over a long period of time, shows that, as a matter of fact, it never was used in that way."

The statement was made by the District Court at the conclusion of the taking of the evidence and the opinion of this Honorable Court of the Supreme Court of the United States does not consider the point or the argument made



by Petitioners with reference to the fact that the District Court judgment was actually based on the use to which the articles were put.

Again, Petitioners further respectfully show to this Honorable Court that there was no consideration by this Honorable Court on the matters set forth in the Petitioners' Reply Brief, to-wit, that there was no proper admissible evidence whatsoever upon which the District Court judgment might be based.

Petitioners therefore respectfully request a rehearing in this cause to the end that the points hereinabove designated may be considered by this Honorable Court.

Respectfully Submitted,

IRL B. ROSENBLUM,  
BERNARD MELLITZ,  
CLYDE W. WAGNER.

April 7, 1942.

I, Irl B. Rosenblum, of counsel for Petitioners to the above and foregoing Petition for Rehearing, respectfully certify that this Petition for Rehearing is presented in good faith and not for delay.

IRL B. ROSENBLUM.

# SUPREME COURT OF THE UNITED STATES.

No. 505.—OCTOBER TERM, 1941.

Lester A. Craneer and George B. Fleischman, co-partners, doing business under the firm names of Valley Steel Products Company and Mid-Valley Steel Company, Petitioners,

vs.

Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 16, 1942.]

Mr. Justice BYRNES delivered the opinion of the Court.

The District Court for the Eastern District of Missouri respondents brought this suit to recover certain freight charges from petitioners. The case was tried without a jury and judgment rendered in favor of respondents in the sum of \$2,263.47. On appeal, the judgment was affirmed by the Circuit Court of Appeals for the Eighth Circuit.

We brought the case here because of the claim that the courts below sustained the jurisdiction of the District Court although the matter concerned called for the exercise of the administrative discretion of the Interstate Commerce Commission, under the established rule first announced in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, as explained in *Gt. N. Ry. v. Merchants Elev. Co.*, 259 U. S. 285.

The shipments, amounting to seven car loads, moved from points in several states, the cars being billed by petitioners to themselves at St. Louis, Missouri. The petitioners billed the contents of the cars as scrap iron and paid the tariff charge applicable to that classification. When the cars arrived at St. Louis, the respondents caused the Western Weighing and Inspection Bureau to inspect their contents. As a result of that inspection, respondents claimed that the articles were actually "pipe thread protecting rings" and that they belonged in the classification of "pipe fittings". The tariff rates on pipe fittings being higher than the rate on scrap iron, demand was made upon petitioners for the difference

in freight charges. The demand was refused and this suit followed.

The trial court found that the articles in question were governed by the tariff for "pipe-fittings" and not by that for "scrap-iron". The Circuit Court of Appeals sustained this finding. In the light of certain proceedings before the Interstate Commerce Commission affecting the articles in question and their relation to the tariffs in controversy, we hold that the lower courts were right.

The only questions of any moment presented by this case arise in connection with these proceedings before the Interstate Commerce Commission. In 1937 petitioners filed with the Commission a complaint against a number of railroads in which they asserted that certain shipments of iron or steel pipe thread protecting rings should have been classified under the freight tariffs as scrap iron or steel and not as pipe fittings. They also urged as an alternative contention that even though the shipments were classed as pipe fittings rather than scrap, the rate was unreasonably high. On August 6, 1937 the Commission dismissed the complaint, holding both that the pipe thread protecting rings fell within the classification of pipe fittings and that the rates so imposed were not unreasonable. *Crancer and Fleischman, et al. v. Abeline and Southern Railway Company, et al.*, 223 I. C. C. 375.

In their answer and in a motion to stay proceedings filed in the District Court in the present case, petitioners asserted that on or about March 16, 1939 (the date on which respondents brought this suit) they had instituted a second action before the Commission. In their complaint in this 1939 action, petitioners alleged that the freight charges demanded by the respondents on the shipments involved in the suit now before us were "unjust and unreasonable . . . to the extent that they exceeded or exceed rates applicable on scrap iron and scrap steel". It is not clear from this language whether petitioners intended to raise anew the question of classification or whether they were simply requesting the Commission to pass again on the reasonableness of the rate. But in its opinion dated February 18, 1941 the Commission stated: "While complainants admit for the purpose of this proceeding that the rates on scrap iron are not applicable, they contend that reasonable rates on thread protectors should bear some definite relation to the scrap iron rates." *Valley Steel Products Company, et al. v. Atchison, Topeka & Santa Fe Railway Company, et al.*, 243 I. C. C. 509, 512. We conclude that

the classification question is not involved in the 1939 I. C. C. proceeding. This proceeding is still pending. The effective date of the February 18, 1941 opinion and order has been indefinitely postponed, a further hearing has been held, but no subsequent opinion or order has been issued.<sup>1</sup>

Petitioners raise two contentions with respect to these I. C. C. proceedings and their bearing upon the present suit. First, they contend that it was reversible error for the District Court to admit in evidence a copy of the 1937 opinion of the Commission. At the trial, petitioners objected to its admission on the ground that the opinion has "absolutely no probative value in this case at all," that it is not "determinative" or "conclusive" and "not even persuasive" in this case, and that there was no pleading that "this opinion . . . is *res adjudicata* of the issues before your Honor." With respect to this point we can only say that petitioners have made a bold attempt to transform their weakness into strength. The present case turns upon whether these iron pipe thread connecting rings are to be classified under the freight tariffs as pipe rings or scrap. That was the very question decided by the Commission in its 1937 opinion, and it was decided adversely to petitioners. It is true that the shipments in the two cases are not the same and that no evidence was introduced to prove that their contents were identical. Consequently, the issues in the present suit are not *res adjudicata*. But the Commission's 1937 opinion could hardly have been more relevant to the question before the District Court. As the Circuit Court observed: "Since the case was tried without a jury, we can see no possible prejudice to appellants by the consideration of the opinion of the Commission by the Court as evidence, rather than by an examination of the same opinion in his library. There is no suggestion that the latter course would have been improper. The trial court did not treat the opinion as being *res adjudicata*." 121 F. 2d 645, 650. We think this is the least that could be said, and that the District Court properly admitted and considered the administrative determination of virtually the same question as that before it.

Second, petitioners contend that the District Court erred in denying their motion to stay proceedings in this case pending action

<sup>1</sup> Order of the Commission in No. 28215, dated April 19, 1941; Order in No. 28215, dated May 23, 1941; Order in No. 28215, dated June 2, 1941; Order in No. 28215, dated June 20, 1941; Order in No. 28215, dated July 22, 1941.



by the I. C. C. in the second proceeding before the Commission. As we have said, the classification question alone was involved in the case before the District Court. The Commission had passed upon that question almost two years earlier. In their newly instituted proceeding, petitioners did not resurrect that dispute but confined themselves to the contention that the rates on pipe fittings were unreasonable as applied to their pipe thread protecting rings. The issue of the reasonableness of the rates was not open to the District Court. The meaning of the tariff had been determined by the Commission. It remained to the railroad only to collect the rates for which the tariff called and for the District Court only to see that the railroad did collect them. "Until changed, tariffs bind both carriers and shippers with the force of law. Under § 6 of the Interstate Commerce Act the carrier cannot deviate from the rate specified in the tariff for any service in connection with the transportation of property. That section forbids the carrier from giving a voluntary rebate in any shape or form. This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collection of less than the tariff rate. It is equally important to aid the efforts of a carrier in collecting published charges in full. Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates." *Lowden v. Simonds*, 306 U. S. 516, 520, 521. Nothing involved in the pending administrative proceedings before the Interstate Commerce Commission was essential to the determination of the issue in this suit. If the trial judge had in the exercise of his discretion continued the trial of the cause until such time as the Commission had passed upon the reasonableness of the rate, the delay might have made it impossible for the carrier to produce the witnesses who had made the inspection of the shipments. On the other hand, the petitioners suffered no hardship as a result of the trial court's insistence on proceeding with the trial. If petitioners pay the judgment in this case and the Commission should in the still pending proceeding decide to modify the tariffs, petitioners can obtain a complete remedy by way of reparation. *Pennsylvania Railroad Company v. International Coal Mining Company*, 230 U. S. 184, 197. The form of the Circuit Court's judgment specifically preserved petitioners' right to such reparation. We hold that under the circumstances there was no abuse of discretion by the trial judge.

*Judgment affirmed.*